

**CITY COUNCIL AGENDA REPORT****19**

April 16, 2013  
Assistant City Manager

**TITLE: RECOMMENDATION TO CONDUCT A JOINT WORKSHOP WITH THE HOUSING COMMISSION TO DISCUSS CITY AFFORDABLE HOUSING POLICIES RELATED TO NEW MULTI-FAMILY RENTAL RESIDENTIAL DEVELOPMENT**

**SUMMARY**

At its meeting of April 3, 2012, the City Council approved a work plan for implementing policies and programs included City's Housing Element Update that included reviewing and amending the City's Inclusionary Zoning Ordinance to potentially increase or modify incentives, to assure its consistency with recent court decisions and Housing Element goals, and to eliminate aspects that may be a constraint to housing development. Staff viewed this as a two-step process that included a new nexus study concerning the City's Lower Income Housing Fees followed by amendments to the IZO.

Recently, as both the Housing and Planning Commissions were reviewing the California Center development, it became apparent the inconsistencies between the IZO's affordable unit requirements for new multifamily residential rental development and recent court decisions, created problems for determining appropriate levels of affordability within the development. As a result both expressed that the matter should be reviewed as quickly as possible to assure that there is a clear policy expressing the City Council's approach to addressing affordable housing requirements for new multi-family residential rental developments. Both commissions also expressed that this policy direction would be beneficial prior to it reviewing the additional multi-family residential developments that are currently under staff review. In view of this situation, staff is recommending the City Council consider holding a joint workshop with the City Housing Commission on May 1 for the purpose of discussing policy matters related to the IZO. Following the workshop, staff would work on developing appropriate amendments and returning those to the Council in June prior to approval of the next multi-family residential project.

**RECOMMENDATION**

Indicate the Council's intent to hold a joint workshop on May 1, 2013, at 6:00 p.m., with the Housing Commission

**FINANCIAL STATEMENT**

There is no direct financial impact to the City as a result of this action.

## **BACKGROUND**

The City's affordable housing policies are found in various City documents, which most notably include:

- The Housing Element of the General Plan (Housing Element)
- The Inclusionary Zoning Ordinance (Ordinance 1818/ PMC 17.44)
- City Guidelines regarding use of Inclusionary Zoning Units Credits (City Resolution - 4-073)
- City Preference Criteria establishing a process for the allocation of affordable units (City Resolution 02-012)
- Down Payment Assistance Guidelines
- Community Development Block Grant guidelines
- Lower Income Housing Fee (PMC 17.40)
- City Resolution 10-390 which approved enhancement to existing non-discrimination policies
- City housing Site Development Standards and Design Guidelines
- Housing Commission actions

Additionally, these policies are influenced by federal, state and regional policies which can have a significant impact on City Council policy decisions. As an example, Association of Bay Area Governments' (ABAG) Regional Housing Needs Allocation (RHNA) and the state's Housing and Community Development (HCD) actions clearly impact local policy. Legislative action, such as the Costa-Hawkins Act adopted in 1995 and which acts as the states rent control law, also shape the affordable housing framework. Finally, litigation, such as the *Palmer/Sixth Street Properties L.P. v. City of Los Angeles* ("Palmer") and *Urban Habitat v. City of Pleasanton* also impact the City's affordable housing actions.

In general, all of the above policies are somewhat reflected in the City's recently updated Housing Element which provides the broadest overview of the City's current affordable housing goals, policies and programs. For example, Goal 5 states *"Produce and retain a sufficient number of housing units affordable to extremely low, low and very low income households to address the City's responsibility for meeting the needs of Pleasanton's workforce, families, and residents, including those with special needs."* To meet this goal, and others with similar emphasis, and to assure consistency with a wide range of influences including ABAG's RHNA, the Urban Habitat settlement agreement and housing policies by HCD, the Housing Element indicates the City's intent to review, and if necessary amend, its Growth Management Program, Inclusionary Zoning Ordinance and the Lower Income Housing Fee. The specific sections are as follows:

- Program 9.1 - Anticipates a review of the Growth Management Program to assure consistency with State law and with the City's current and new infrastructure capacities.
- Program 16.2 – Requires a review and amendment of the IZO to assure consistency with the Housing Element, other City affordable housing programs, to be consistent with recent court decisions, to identify non-profit housing developers to construct

developments with three bedroom units for large households, and to determine if it is appropriate to increase the percentage of affordability to support units for very low and low income households.

- Policy 16 – Similar to Program 16.2, this policy anticipates both a review and modification of the IZO for rental housing to conform with the Costa-Hawkins Act and a statement indicating that new rental development is strongly encouraged to meet the IZO by providing housing units affordable to extremely low, very low and low income households.
- Program 17.1 – Anticipates a review and modification of the City's Lower Income Housing Fee (LIHF) to assure conformance with AB 1600 and other intended uses.

In response to the above, the Growth Management Program was amended in October 2012 and a contract was recently awarded to conduct the LIHF nexus study, which will provide the basis upon which the City Council can review any fee adjustment. Staff received the first draft of the LIHF report and anticipates it will be presented to the City Council for adoption in August/September after review by the Housing Commission.

Regarding the update to the IZO, staff's intent has been to have this generally track the LIHF so that it has the opportunity to receive feedback regarding LIHF fee impacts and alternative fee structures as they relate to obtaining inclusionary zoning units. As an example, if the LIHF study indicates that meeting the existing affordable housing need would require a significant fee increase, staff and the City Council may decide to look at other means of obtaining affordable housing rather than approving a substantial fee increase. Notwithstanding the benefits of this approach, the recent influx of development application for larger apartment projects, including California Center, St. Anton, and Auf der Maur, has magnified the IZO issues that were anticipated in the Housing Element.

In general, the most significant issue regarding the IZO is that there is currently a disconnect between its requirement that 15% of all units in a new residential multi-family rental development be rent-restricted to very low (50% of the Area Median Income or AMI; currently \$44,600 for a four person household) and low income households (80% of the AMI; currently \$71,350 for a four person household). There is similar inconsistency between the IZO and the *Palmer* case which held that local inclusionary requirements requiring rent restricted units violate the Costa-Hawkins Act that allows landlords to set the initial rent for a new unit and to adjust rents to market levels whenever a unit is vacated (so-called "vacancy decontrol"). This disconnect is also evident in the City's Housing Site Development Standards and Design Guidelines which require compliance with the City's IZO and the "by right" aspects of sites zoned for high density rental housing. Finally, the City is expected to implement a range of Housing Element programs that should, if appropriately applied, lead to meeting state mandated and RHNA housing and affordable housing targets. However, absent strict IZO requirements, it is doubtful that new affordable housing units will approach these targets.

In view of *Palmer*, but consistent with the overall intent of obtaining new rent restricted units for affordable households, staff approached negotiations with the California Center development with the understanding that it would obtain the maximum level of affordability based on mutual agreement between the parties. The end result of this effort was two affordable housing options; both of which fall short of the level of affordability that has been included in developments since the IZO was adopted in 2001. Nevertheless, the options do meet basic IZO features such as the requirement that affordable units will be of equal quality and dispersed throughout the development, the acceptance of Section 8 vouchers, the inclusion of some units reserved for the disabled, application of the City's preference system, etc.

When these options were presented to the Housing Commission, it expressed concern regarding inconsistencies with the IZO, the Housing Element and the lack of policy direction regarding expectations for affordable housing in view of the current legal environment. This concern was also expressed by the Planning Commission which took action recommending the City Council review the IZO related policies in an attempt to develop consistencies between expectations, *Palmer* and Housing Element programs and policies.

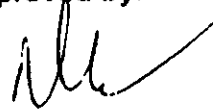
In view of this situation, staff is requesting the City Council hold a joint meeting with the Housing Commission on May 1, 2013, for the purpose of identifying policies and expectations that could be incorporated into an amended IZO that would be in place to guide affordable housing negotiations with upcoming developments, including St. Anton and Auf der Maur. Assuming the Council holds the workshop, staff anticipates that potential IZO changes would be reviewed by the Housing Commission at its meeting of May 16 when it would also review the affordable housing proposal from the St. Anton development. An introduction of an amended ordinance could be presented to the City Council at its June 4 meeting. As such, the workshop would not result in a significant delay in development review. If the Council determines that it can provide direction regarding its affordable housing goals and policies absent the work shop, staff requests it provide that direction at the April 16 meeting.

Submitted by:

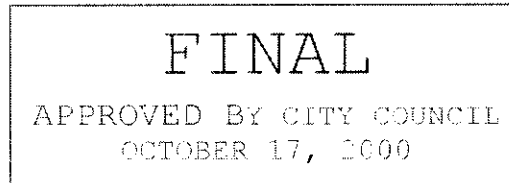


Steve Bocian  
Assistant City Manager

Approved by:



Nelson Fialho  
City Manager



**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE OF THE CITY OF PLEASANTON  
ADOPTING CHAPTER 17.44 OF THE PLEASANTON MUNICIPAL CODE  
TO INCORPORATE A NEW INCLUSIONARY ZONING ORDINANCE**

THE CITY COUNCIL OF THE CITY OF PLEASANTON DOES HEREBY ORDAIN  
AS FOLLOWS:

**SECTION I.**

**A new Chapter 17.44 is hereby added as follows:**

"Chapter 17.44 Inclusionary Zoning

**ARTICLE I -- GENERAL PROVISIONS**

**Section 17.44.010. Title.**

This Chapter shall be called the "Inclusionary Zoning Ordinance of the City of Pleasanton."

**Section 17.44.020. Purpose.**

The purpose of this Chapter is to enhance the public welfare and assure that further housing development attains the City's affordable housing goals by increasing the production of residential units affordable to households of very low, low, and moderate income, and by providing funds for the development of very low, low, and moderate income ownership and/or rental housing. In order to assure that the limited remaining developable land is utilized in a manner consistent with the City's housing policies and needs, 15 percent of the total number of units of all new Multiple Family Residential Projects containing 15 or more units, constructed within the City as it now exists and as may be altered by annexation, shall be affordable to Very Low and Low Income households. For all new Single Family Residential Projects of 15 units or more, at least 20% of the project's dwelling units shall be affordable to Very Low, Low, and/or Moderate Income households. These requirements shall apply to both ownership and rental projects.

### **Section 17.44.030. Definitions.**

For the purposes of this Chapter, certain words and phrases shall be interpreted as set forth in this section unless it is apparent from the context that a different meaning is intended.

**Affordable Housing Proposal:** A proposal submitted by the Project Owner as part of the City development application (e.g., design review, Planned Unit Development, etc.) stating the method by which the requirements of this Chapter are proposed to be met.

**Affordable Rent:** A monthly rent (including utilities as determined by a schedule prepared by the City) which does not exceed one-twelfth (1/12) of thirty percent (30%) of the maximum annual income for a household of the applicable income level.

**Affordable Sales Price:** A sales price which results in a monthly mortgage payment (including principal and interest) which does not exceed one-twelfth (1/12) of thirty-five percent (35%) of the maximum annual income for a household of the applicable income level.

**Amenities:** Interior features which are not essential to the health and safety of the resident, but provide visual or aesthetic appeal, or are provided as conveniences rather than as necessities. Interior Amenities may include, but are not limited to, fireplaces, garbage disposals, dishwashers, cabinet and storage space and bathrooms in excess of one. Amenities shall in no way include items required by City building codes or other ordinances that are necessary to insure the safety of the building and its residents.

**Applicant:** Any person, firm, partnership, association joint venture, corporation, or any entity or combination of entities which seeks City permits and approvals for a project.

**Commercial, Office, and Industrial Project:** For the purposes of this Chapter, any new non-residential (commercial, office, or industrial) development or redevelopment greater than 10 gross acres or 250,000 square feet of gross building area, whichever is less.

**City:** The City of Pleasanton or its designee or any entity with which the City contracts to administer this chapter.

**Dwelling Unit:** A dwelling designed for occupancy by one household.

**Household:** One person living alone; or two or more persons sharing residency whose income is considered for housing payments.

**Household, Low Income:** A household whose annual income is more than 50% but does not exceed 80% of the annual median income for Alameda County, based upon the

annual income figures provided by the U.S. Department of Housing and Urban Development (HUD), as adjusted for household size.

Household, Moderate Income: A household whose annual income is more than 80% but does not exceed 120% of the annual median income for Alameda County, based upon the annual income figures provided by HUD, as adjusted for household size.

Household, Very Low Income: A household whose annual income does not exceed 50% of the annual median income for Alameda County, based upon the annual income figures provided by HUD, as adjusted for household size.

HUD: The United States Department of Housing and Urban Development or its successor.

Inclusionary Unit: A Dwelling Unit as required by this Chapter which is rented or sold at Affordable Rents and/or Affordable Sales Prices (as defined by this Chapter) to Very Low, Low, or Moderate Income Households.

Inclusionary Unit Credits: Credits approved by the City Council in the event a project exceeds the total number of Inclusionary Units required in this Chapter. Inclusionary Unit Credits may be used by the Project Owner to meet the affordable housing requirements of another project subject to approval by the City Council.

Income: The gross annual household income as defined by HUD.

Life of the Inclusionary Unit: The term during which the affordability provisions for Inclusionary Units shall remain applicable. The affordability provisions for inclusionary units shall apply in perpetuity from the date of occupancy, which shall be the date on which the City of Pleasanton performs final inspection for the building permit.

Lower Income Housing Fee: A fee paid to the City by an applicant for a project in the City, in lieu of providing the Inclusionary Units required by this Chapter.

Median Income for Alameda County: The median gross annual income in Alameda County as determined by HUD, adjusted for household size.

Off-Site Inclusionary Units: Inclusionary Units constructed within the City of Pleasanton on a site other than the site where the applicant intends to construct market rate units.

Ownership Units: Inclusionary Units developed as part of a residential development which the Applicant intends will be sold, or which are customarily offered for individual sale.

Project Owner: Any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities which holds fee title to the land on which the project is located.

Project: A residential housing development at one location or site including all dwelling units for which permits have been applied for or approved.

Property Owner: The owner of an Inclusionary Unit, excepting a "Project Owner".

Rental Units: Inclusionary Units which the Applicant intends will be rented or leased, or which are customarily offered for lease or rent.

Recapture Mechanisms: Legal programs and restrictions by which subsidies provided to Inclusionary Units will be controlled and repaid to the City and/or other entity upon resale, to insure the ongoing preservation of affordability of Inclusionary Units or to insure funds for Inclusionary Units remain within the City's affordable housing program.

Resale Restrictions: Legal restrictions which restrict the price of Inclusionary Units to insure that they remain affordable to Very Low, Low, and Moderate Income households on resale.

Residential Project, Multiple Family: A residential project consisting of condominiums, apartments, and similar dwellings attached in groups of four or more units per structure and including multiple units located on a single parcel of land under common ownership.

Residential Project, Single Family: A residential project consisting of detached and attached single family homes, including paired single family, duets, duplexes, townhomes, and similar unit types where each unit is located on a separate parcel of land.

Unit Type: Various dwelling units within a project which are distinguished by number of bedrooms and/or the type of construction (e.g., detached single family, duets, townhomes, condominiums).

## **ARTICLE II -- ZONING REQUIREMENTS**

### **Section 17.44.040. General Requirements/Applicability.**

#### **A. Residential Development**

For all new Multiple Family Residential Projects of 15 units or more, at least 15% of the project's dwelling units shall be affordable to Very Low, and/or Low Income households. For all new Single Family Residential Projects of 15 units or more, at least 20% of the

project's dwelling units shall be affordable to Very Low, Low , and/or Moderate Income households. These dwelling units shall be referred to as "Inclusionary Units". Special consideration will be given to projects in which a significant percentage of the Inclusionary Units are for Very Low and Low Income households. The specific mix of units within the three affordability categories shall be subject to approval by the City.

The Inclusionary Units shall be reserved for rent or purchase by eligible Very Low, Low, and Moderate Income Households, as applicable. Projects subject to these requirements include, but are not limited to, single-family detached dwellings, townhomes, apartments, condominiums, or cooperatives provided through new construction projects, and/or through conversion of rentals to ownership units.

The percentage of Inclusionary Units required for a particular project shall be determined only once on a given project, at the time of Tentative Map approval, or, for projects not processing a map, prior to issuance of building permit. If the subdivision design changes, which results in a change in the number of Unit Types required, the number of Inclusionary Units required shall be recalculated to coincide with the final approved project. In applying and calculating the fifteen (15) percent requirement, any decimal fraction less than or equal to 0.50 may be disregarded, and any decimal fraction greater than 0.50 shall be construed as one Unit.

## **B. Commercial, Office, and Industrial (COI) Development**

In lieu of paying the Lower Income Fee as set forth in City Ordinance No. 1488, COI development may provide affordable housing consistent with this Ordinance. As a result, new COI developments are strongly encouraged to submit an Affordable Housing Proposal as set forth in Section 17.44.100 of this ordinance. Upon submittal of the Affordable Housing Proposal, City staff will meet with the developer to discuss the potential for providing incentives to encourage on-site construction of affordable housing units and alternatives to constructing affordable units as set forth in this ordinance. In the event a developer requests incentives or alternatives as a means of providing affordable housing in connection with a COI development, the Affordable Housing Proposal will be reviewed as set forth in Section 17.44.100 of this Ordinance. COI development not pursuing the inclusion of affordable housing shall be subject to the Lower Income Fees as set forth in City Ordinance No. 1488.

### **Section 17.44.050. Inclusionary Unit Provisions and Specifications**

- A. Inclusionary Units shall be dispersed throughout the project unless otherwise approved by the City.
- B. Inclusionary Units shall be constructed with identical exterior materials and an exterior architectural design that is consistent with the market rate units in the project.

- C. Inclusionary Units may be of smaller size than the market units in the project. In addition, Inclusionary Units may have fewer interior amenities than the market rate units in the project. However, the City may require that the Inclusionary Units meet certain minimum standards. These standards shall be set forth in the Affordable Housing Agreement for the project.
- D. Inclusionary Units shall remain affordable in perpetuity through recordation of an Affordable Housing Agreement as described in Section 17.44.060 of this Chapter.
- E. All Inclusionary Units in a project shall be constructed concurrently within or prior to the construction of the project's market rate units.
- F. For purposes of calculating the Affordable Rent or Affordable Sales Price of an Inclusionary Unit, the following household size assumptions shall be used for each applicable dwelling Unit Type:

<u>Unit Size</u>	<u>HUD Income Category By Household Size</u>
Studio Unit	One Person
One Bedroom Unit	Two Persons
Two Bedroom Unit	Three Persons
Three Bedroom Unit	Four Persons
Four or more Bedroom Unit	Five or more Persons

- G. The City's adopted preference and priority system shall be used for determining eligibility among prospective beneficiaries for affordable housing units created through the Inclusionary Zoning Ordinance.

#### **Section 17.44.060. Affordable Housing Agreement**

An Affordable Housing Agreement shall be entered into by the City and the Project Owner. The Agreement shall record the method and terms by which a Project Owner shall comply with the requirements of this Chapter. The approval and/or recordation of this Agreement shall take place prior to final map approval or, where a map is not being processed, prior to the issuance of building permits for such lots or units.

The Affordable Housing Agreement shall state the methodology for determining a unit's initial and ongoing rent or sales and resale price(s), any resale restrictions, occupancy requirements, eligibility requirements, City incentives including second mortgages, recapture mechanisms, the administrative process for monitoring unit management to assure ongoing affordability and other matters related to the development and retention of the inclusionary units.

In addition to the above, the Affordable Housing Agreement shall set forth any waiver of the Lower Income Housing Fee. For projects which meet the affordability threshold with Very Low and/or Low Income units, all units in the project shall be eligible for a waiver of the Lower Income Housing Fee. For Single Family Residential Projects which meet the affordability threshold with Moderate Income units, or Multiple Family Residential Projects which do not meet the affordability threshold, only the Inclusionary Units shall be eligible for a waiver of the Lower Income Housing Fee except as otherwise approved by the City Council.

To assure affordability over the life of the unit, the Affordable Housing Agreement shall be recorded with the property deed or other method approved by the City Attorney. In the event an Inclusionary unit is affordable by design the Affordable Housing Agreement shall stipulate the method for assuring that the units retain their affordability as the housing market changes.

The Director of Planning and Community Development may waive the requirement for an Affordable Housing Agreement for projects approved prior to the effective date of this ordinance and/or for projects that have their affordable housing requirements included in a development agreement or other City document.

#### **Section 17.44.070. Incentives to Encourage On-Site Construction of Inclusionary Units**

The City shall consider making available to the Applicant incentives to increase the feasibility of residential projects to provide Inclusionary Units. Incentives or financial assistance will be offered only to the extent resources for this purpose are available and approved for such use by the City Council or City Manager, as defined below, and to the extent that the Project, with the use of incentives or financial assistance, assists in achieving the City's housing goals. However, nothing in this chapter establishes, directly or through implication, a right of an Applicant to receive any assistance or incentive from the City.

Any incentives provided by the City shall be set out in the Affordable Housing Agreement pursuant to Section 17.44.060 of this Chapter. The granting of the additional incentives shall require demonstration of exceptional circumstances that necessitate assistance from the City, as well as documentation of how such incentives increase the feasibility of providing affordable housing.

The following incentives may be approved for Applicants who construct Inclusionary Units on-site:

#### **A. Fee Waiver or Deferral**

The City Council, by Resolution, may waive or defer payment of City development impact fees and/or building permit fees applicable to the Inclusionary Units or the project of which they are a part. Fee waivers shall meet the criteria included in the City's adopted policy for evaluating waivers of City fees for affordable housing projects. The Affordable Housing Agreement shall include the terms of the fee waiver.

#### **B. Design Modifications**

The granting of design modifications relative to the inclusionary requirement shall require the approval of the City Council and shall meet all applicable zoning requirements of the City of Pleasanton. Modifications to typical design standards may include the following:

- Reduced setbacks
- Reduction in infrastructure requirements
- Reduced open space requirements
- Reduced landscaping requirements
- Reduced interior or exterior amenities
- Reduction in parking requirements
- Height restriction waivers

#### **C. Second Mortgages**

The City may utilize available Lower Income Housing Funds for the purpose of providing second mortgages to prospective unit owners or to subsidize the cost of a unit to establish an Affordable Rent or an Affordable Sales Price. Terms of the second mortgage or subsidy shall be stated in the Affordable Housing Agreement. The utilization of these incentives shall not be the sole source of providing the Inclusionary Units and they are intended to augment the developer's proposal.

#### **D. Priority Processing**

After receiving its discretionary approvals, a Project that provides Inclusionary Units may be entitled to priority processing of building and engineering approvals subject to the approval of the City Manager. A Project eligible for priority processing shall be assigned to City engineering and/or building staff and processed in advance of all non-priority items.

## **Section 17.44.080. Alternatives to Constructing Inclusionary Units On-Site**

The primary emphasis of the Inclusionary Zoning Ordinance is to achieve the inclusion of affordable housing units to be constructed in conjunction with market rate units within the same project in all new residential projects. However, the City acknowledges that it may not always be practical to require that every project satisfy its affordable housing requirement through the construction of affordable units within the project itself. Therefore, the requirements of this Chapter may be satisfied by various methods other than the construction of Inclusionary Units on the project site. Some examples of alternate methods of compliance appear below. As housing market conditions change, the City may need to allow alternatives to provide options to Applicants to further the intent of providing affordable housing with new development projects.

### **A. Off-Site Projects**

Inclusionary Units required pursuant to this Chapter may be permitted to be constructed at a location within the City other than the project site. Any off-site Inclusionary Units must meet the following criteria:

1. The off-site Inclusionary Units must be determined to be consistent with the City's goal of creating, preserving, maintaining, and protecting housing for Very Low, Low, and Moderate Income Households.
2. The off-site Inclusionary Units must not result in a significant concentration of Inclusionary Units in any one particular neighborhood.
3. The off-site Inclusionary Units shall conform to the requirements of all applicable City Ordinances and the provisions of this Chapter.
4. The occupancy and rents of the off-site Inclusionary Units shall be governed by the terms of a deed restriction, and if applicable, a declaration of covenants, conditions and restrictions similar to that used for the on-site Inclusionary Units.

The Affordable Housing Agreement shall stipulate the terms of the off-site Inclusionary Units. If the construction does not take place at the same time as project development, the agreement shall require the Units to be produced within a specified time frame, but in no event longer than five (5) years. A cash deposit or bond may be required by the City, refundable upon construction, as assurance that the units will be built.

### **B. Land Dedication**

An Applicant may dedicate land to the City or a local non-profit housing developer in place of actual construction of Inclusionary Units upon approval of the City Council.

The intent of allowing a land dedication option is to provide the City or a local non-profit housing developer the land needed to make an Inclusionary Unit development feasible, thus furthering the intent of this Chapter.

The dedicated land must be appropriately zoned, buildable, free of toxic substances and contaminated soils, and large enough to accommodate the number of Inclusionary Units required for the project. The City's acceptance of land dedication shall require that the lots be fully improved, with infrastructure, adjacent utilities, grading, and fees paid.

### **C. Credit Transfers**

In the event a project exceeds the total number of Inclusionary Units required in this Chapter, the Project Owner may request Inclusionary Unit Credits which may be used to meet the affordable housing requirements of another project. Inclusionary Unit Credits are issued to and become the possession of the Project Owner and may not be transferred to another Project Owner without approval by the City Council. The number of Inclusionary Unit Credits awarded for any project is subject to approval by the City Council.

### **D. Alternate Methods of Compliance**

Applicants may propose creative concepts for meeting the requirements of this Chapter, in order to bring down the cost of providing Inclusionary Units, whether on or off site. The City Council may approve alternate methods of compliance with this Chapter if the Applicant demonstrates that such alternate method meets the purpose of this Chapter (as set forth in Section 17.44.020).

### **E. Lower Income Housing Fee Option**

In lieu of providing Inclusionary Units in a project, an applicant may pay the City's Lower Income Housing Fee as set forth in Chapter 17.40 of the Municipal Code.

## **ARTICLE III -- MISCELLANEOUS**

### **Section 17.44.090. Administration**

An applicant of a project subject to this Chapter shall submit an Affordable Housing Proposal stating the method by which it will meet the requirements of this Chapter. The Affordable Housing Proposal shall be submitted as part of the applicant's City development application (e.g., design review, Planned Unit Development, etc.) to the Planning Department in a form approved by the City Manager. The Director of Planning and Community Development may waive the requirement for submittal of an Affordable

Housing Proposal for projects approved prior to the effective date of this ordinance and/or for projects that have undergone considerable public review during which affordable housing issues were addressed.

The Affordable Housing Proposal shall be reviewed by the City's Housing Commission at a properly noticed meeting open to the public. The Housing Commission shall make recommendations to the City Council either accepting, rejecting or modifying the developer's proposal and the utilization of any incentives as outlined in this Chapter. The Housing Commission may also make recommendations to the Planning Commission regarding the project as necessary to assure conformance with this Chapter.

Acceptance of the applicant's Affordable Housing Proposal is subject to approval by the City Council, which may direct the City Manager to execute an Affordable Housing Agreement in a form approved by the City Attorney. The City Manager or his/her designee shall be responsible for monitoring the sale, occupancy and resale of Inclusionary Units.

#### **Section 17.44.100. Conflict of Interest.**

The following individuals are ineligible to purchase or rent an Inclusionary Unit: (a) City employees and officials (and their immediate family members) who have policy making authority or influence regarding City housing programs; (b) the Project Applicant and its officers and employees (and their immediate family members); and (c) the Project Owner and its officers and employees (and their immediate family members).

#### **Section 17.44.110. Enforcement.**

The City Manager is designated as the enforcing authority. The City Manager may suspend or revoke any building permit or approval upon finding a violation of any provision of this chapter. The provisions of this chapter shall apply to all agents, successors and assigns of an Applicant. No building permit or final inspection shall be issued, nor any development approval be granted which does not meet the requirements of this chapter. In the event that it is determined that rents in excess of those allowed by operation of this Chapter have been charged to a tenant residing in an Inclusionary Unit, the City may take appropriate legal action to recover, and the Project Owner shall be obligated to pay to the tenant or to the City in the event the tenant cannot be located, any excess rents charged.

#### **Section 17.44.120. Appeals.**

Any person aggrieved by any action or determination of the City Manager under this ordinance, may appeal such action or determination to the City Council in the manner provided in Chapter 18.144 of the Pleasanton Municipal Code."

**SECTION 2. SEVERABILITY.**

The provisions of this Ordinance are severable and if any provision, clause, sentence, word or part thereof is held illegal, invalid, unconstitutional, or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, clauses, sentences, sections, words or parts thereof of the ordinance or their applicability to other persons or circumstances.

**SECTION 3. EFFECTIVE DATE AND POSTING OF ORDINANCE.**

This ordinance shall take effect and be in force thirty (30) days from and after the date of its final adoption. The City Clerk of the City of Pleasanton shall cause this Ordinance to be posted in at least three (3) public places in the City of Pleasanton in accordance with Section 39633 of the Government Code of California.

I HEREBY CERTIFY THAT THE FOREGOING WAS DULY AND REGULARLY ADOPTED BY THE CITY COUNCIL OF THE CITY OF PLEASANTON, AT A MEETING HELD ON \_\_\_\_\_, 20\_\_\_\_, BY THE FOLLOWING VOTE:

AYES: Councilmembers -  
NOES:  
ABSENT:  
ABSTAIN:  
ATTEST:

\_\_\_\_\_  
Peggy L. Ezidro, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael H. Roush, City Attorney

**ATTACHMENT 3**  
**City Design Guidelines**

## **PART 2**

### **PUD Regulations**

**All development applications for the identified housing sites will be reviewed by the City through the Planned Unit Development (PUD) process, which will include review and recommendation by the Planning Commission and approval or denial by the City Council at noticed public hearings.** The following regulations establish numeric standards in order to realize the desired building, open space, and street character contained in the design guidelines. The City Council may grant exceptions in the application of these development standards where such proposals meet the intent and purpose of the standards. Additional PUD regulations and standards are located throughout the rest of the document.

In addition to the PUD standards described below, all residential development shall satisfy the **Livability Standards** in this document relating to:

- The provision of pedestrian and bicycle connections
- Group Usable Open Space (PUD Regulations)
- Landscaped Paseos (A.6)
- Open Space, Landscaping and Lighting (A8, A9, and A10)

And shall also incorporate residential amenities such as play/activity areas, pools, water features, fitness facilities, and community rooms.

**Density:** Each site has been zoned for a minimum of 30, 35 or 40 units per acre (see Table 2.1 Housing Sites, for details). The allowed density range is shown in Table 2.1. These densities are in addition to whatever on-site retail or service uses the City may approve as part of a mixed-use project, if such additional development was anticipated in the Supplemental EIR. See Table 2.1 and Appendix B for site-specific guidelines on uses, density, setbacks, etc.

***Note:** The City interprets the minimum residential density to be an average minimum density to be met over each individual parcel.*

**Affordability:** All development shall comply with the City's Inclusionary Zoning Ordinance through affordable housing agreements entered into between the City and each developer. Affordable units will be deed-restricted in perpetuity. The affordable housing agreements will be recorded and will run with the land.

**Section 8 Rental Assistance Vouchers:** Through the affordable housing agreements entered into between the City and each developer, the developments will generally be required to accept HUD Section 8 Rental Vouchers as a means of assisting qualified applicants.

**Bedroom Mix of Affordable Units:** For each project, a minimum of 10% of the total affordable units will be three-bedroom units; a minimum of 35% of the total affordable units will be two-bedroom units; and the remaining affordable units will be studio or one bedroom units.

**RESOLUTION NO. 10-390****A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PLEASANTON,  
APPROVING ENHANCEMENTS TO EXISTING NON-DISCRIMINATION  
HOUSING POLICIES**

**WHEREAS**, in 2003, the Pleasanton City Council adopted a Housing Element; and

**WHEREAS**, the City's Housing Element includes goals and programs that prohibits discrimination to housing opportunities in Pleasanton, including the goal of identifying and making special provisions for the community's special needs housing; and

**WHEREAS**, the City is about to embark on an update to the existing Housing Element; and

**WHEREAS**, through adoption of this resolution, the City Council reaffirms its position on housing non-discrimination, and

**WHEREAS**, it is the intent of the City Council to update its Housing Element goals and programs through study and consideration of adoption of additional goals and programs related to eliminating discrimination in the areas of affordable housing for families with children and senior citizens as part of its Housing Element update process.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PLEASANTON CALIFORNIA, DOES RESOLVE, DECLARE, DETERMINE AND ORDER AS FOLLOWS:**

**SECTION 1.** That the Council does hereby adopt the following Non-Discrimination Policy:

In recognition of State and Federal laws which prohibit municipalities from discriminating against developers of affordable housing, including non-profit developers of affordable housing, and from discriminating against families with children in need of affordable housing, it is the official policy of the City of Pleasanton, that the City staff and the City Council will act affirmatively to promote the development of well-designed affordable housing for families with children in Pleasanton. The City Manager will report regularly to the City Council on the City's efforts to fulfill this policy, the success of those efforts, and plans and proposals to attract well-designed affordable housing for families with children in the future.

**SECTION 2.** As part of its Housing Element update process the City will study and consider adoption of goals and programs promoting affordable non-profit housing development for families, as well as for other special needs households, including strengthening existing programs to promote construction of affordable three bedroom units for large families and including the goal of building affordable family units and affordable senior units in proportion to the need for each.

**SECTION 3.** As part of the Housing Element Update process, the City staff will conduct analysis and prepare information for review by the public and consideration of adoption by the City Council, related to Sections 1 and 2 above. This analysis will include identifying sites that may be most competitive for Low Income Housing Tax Credits based on the "site amenities" point criteria included as part of the California Tax Credit Allocation Committee Application.

Following the public review process for the Housing Element, which will include discussion with non-profit affordable housing developers, and identification of the most competitive sites for Lower Income Housing Tax Credits, the City Council will adopt and implement one or more programs to attract non-profit affordable housing development for families for the identified sites. Such program(s) shall not preclude non profit housing developments on sites other than the identified sites. The City will also study its existing Lower Income Housing Fee and Inclusionary Housing Ordinance to determine if it is appropriate to increase the amount of the fee or percentage of affordability to support affordable housing development.

**PASSED, APPROVED, AND ADOPTED** by the City Council of the City of Pleasanton at a regular meeting held on July 20, 2010.

I, Karen Diaz, City Clerk of the City of Pleasanton, California, certify that the foregoing Resolution was adopted by the City Council at a regular meeting held on the 20th day of July, 2010, by the following vote:

Ayes:	Councilmembers Cook-Kallio, McGovern, Thorne, Mayor Hosterman
Noes:	None
Absent:	Councilmember Sullivan

  
Karen Diaz, City Clerk

APPROVED AS TO FORM:

  
Jonathan P. Lowell, City Attorney



P.O. Box 520, Pleasanton, CA 94566-0802  
Housing Division (tel. 925-931-5007; fax 925-931-5485)

## **2013**

### **Applicable Income and Rent Limits for Below-Market Rent (BMR) Apartments**

(revised annually by City)

<b>Persons in Household</b>	<b>MAXIMUM ANNUAL INCOME:</b>				
	<b>120% (Moderate)</b>	<b>100% (Median)</b>	<b>80% (Low)</b>	<b>60% (Low)</b>	<b>50% (Very Low)</b>
<b>1</b>	\$74,950	\$62,450	\$49,950	\$37,450	\$31,200
<b>2</b>	\$85,650	\$71,350	\$57,100	\$42,800	\$35,700
<b>3</b>	\$96,350	\$80,300	\$64,200	\$48,150	\$40,150
<b>4</b>	\$107,050	\$89,200	\$71,350	\$53,500	\$44,600
<b>5</b>	\$115,600	\$96,350	\$77,050	\$57,800	\$48,150
<b>6</b>	\$124,150	\$103,450	\$82,800	\$62,100	\$51,750
<b>7</b>	\$132,750	\$110,600	\$88,500	\$66,350	\$55,300
<b>8</b>	\$141,300	\$117,750	\$94,200	\$70,650	\$58,850

<b>Size/Type of Unit</b>	<b>MAXIMUM MONTHLY RENT:</b>				
	<b>120% (Moderate)</b>	<b>100% (Median)</b>	<b>80% (Low)</b>	<b>60% (Low)</b>	<b>50% (Very Low)</b>
<b>Studio</b>	\$1,874	\$1,561	\$1,249	\$936	\$780
<b>1 BR</b>	\$2,141	\$1,784	\$1,428	\$1,070	\$893
<b>2 BR</b>	\$2,409	\$2,008	\$1,605	\$1,204	\$1,004
<b>3 BR</b>	\$2,890	\$2,409	\$1,926	\$1,445	\$1,204

#### **NOTES:**

Derived from the Oakland Primary Metropolitan Statistical Area (PMSA) most recent median income level for family of four (\*). The Oakland PMSA includes Alameda and Contra Costa counties. Maximum annual income and monthly rent levels are shown for five different income categories: 1) 120% of median, 2) 100% of median, 3) 80% of median, 4) 60% of median, and 5) 50% of median. The maximum annual income level is determined by the number of persons in the household. The applicable maximum rent level is determined by the size and type of the rental unit and assumes 30% of the monthly household income for housing. The rent calculations shown above are based on the following household size assumptions: Studio = 1 person; 1BR = 2 persons; 2BR = 3 persons; 3BR = 5 persons.

(\*) Department of Housing and Urban Development (HUD); \$89,200; 12/11/2012

*Citizens for a Caring Community*  
P.O. Box 1781, Pleasanton CA 94566

April 8, 2013

Pleasanton Housing Commission  
City of Pleasanton  
Pleasanton CA 94566  
Re: Workshop Comments

Dear Chairman Casey and Housing Commissioners,

Below please find our preliminary comments on the discussion topics outlined in the workshop staff report. We are very interested in receiving comments on these ideas. Not only from the Commission and staff, but also from other stakeholders who have an interest in the development of properties which the City has rezoned in order to fulfill Pleasanton's RHNA obligations.

**As part of this workshop staff intends to discuss the following:**

- **A summary of legal environment related to affordable housing in rental development. (Attachment 1)**
- **A review of the City's Inclusionary Zoning Ordinance. (Attachment 2)**

**COMMENTS**

**City IZO positives:**

- The IZO has proved more effective for producing affordable units than the previous practice of collecting a Lower Income Housing Fee that was inadequate to facilitate construction of the number of affordable units identified in RHNA, or meeting housing needs identified by Pleasanton residents and businesses.
- Inclusion of affordable units within market rate development generally required no assistance from the City other than waiving LIHF payments.
- Recording an agreement that runs with the land for housing development to provide a set amount of affordability "in perpetuity" allows Pleasanton to add to affordable housing stock as the City grows.
- Affordable units cost less to produce in projects that don't pay prevailing wage for construction.
- "Section 17.44.080. Alternatives to Constructing Inclusionary Units On-Site" provides flexibility. Off-site construction and land dedication alternatives are consistent with accommodating for-profit/nonprofit housing partnerships.

**City IZO negatives:**

- The 15% inclusionary requirement cannot generate enough units or depth of affordability to fulfill RHNA identified housing needs.
- The 15% IZO requirement may not even mitigate the need for affordable housing generated by the remaining 85% of market rate units.
- The IZO only provides units affordable at the very top of the Low and Very Low income range. Households earning 51% - 79% AMI, or below 49% AMI will not have enough income to qualify for rent restricted units provided by the IZO.
- The IZO allows Moderate Income units (80-120% AMI) to be counted as part of the IZO requirement. Periods of high vacancy and/or low demand often result in these units having higher rents than unrestricted units in the same complex
- Pleasanton can only use the LIHF to assist a developer in providing more affordability in apartment projects if the developer is willing to pay prevailing construction wages. The value of incentives offered by the IZO appears insufficient to overcome the financial benefit of using non-union labor.
- **Timing of Affordable Housing Agreement Approval - Section 17.44.060.**  
Specifying only that the Housing Agreement will be recorded before the final map implies that determinations about how a project will provide affordable units follows approval of project design. **On land rezoned in response to RHNA and the Housing Element approval process, the City should first focus on evaluating how an applicant's preliminary concept can use options provided by an IZO to yield the greatest number of affordable units.** The City should not process more detailed design plans until AFTER the applicant and staff have completed this evaluation and made a report to the Housing Commission and Council.
- The IZO option requiring rent restricted units to be scattered throughout a market rate project limits the number of affordable units as well as the depth of their affordability. The developer's ability to subsidize lower rents in perpetuity constrains the City's ability to use the land to meet its housing needs. The IZO's other options could actually provide more affordable units than 15% of a project's market rate units. Therefore, defining 15% as the base affordability requirement is problematic because it undercuts the City's ability to meet RHNA numbers.

**Developer IZO positives:**

- Not having to pay LIH fee.
- The ability to include Moderate Income units as affordable, which rent at about the market rate, while not having to pay the LIHF.
- Rent restricted units only need to be affordable to households earning at the top of 50% AMI, 80% AMI, and 120% AMI income categories.

**Developer IZO negatives:**

- The requirement to provide affordable units in perpetuity.
- City's ability to require depth of affordability for households earning less than 80% AMI.
- (These negatives have essentially disappeared with the Palmer decision.)

- **A review of the City's Housing Development Standards and Design Guidelines as they relate to affordable housing. (Attachment 3)**

**COMMENTS**

**City Design Standards positives:**

- Requirements for 10% 3 bedroom units and 35% 2 bedroom units needed by workforce families.
- The required amenities list and discretion allowances for the City.

**City Design Standard negatives:**

- Requires an enforceable IZO to achieve adequate 2 and 3 bedroom units.
- Allows unspecified numbers of studio units that no one really wants.

**Developer Design Standards positives:**

- The PUD Regulations flow from Pleasanton's IZO, which doesn't legally exist.
- Allowance for an undefined number studio apartments in the affordability mix.
- Invalidation of the IZO as a tool for requiring affordable units within apartment complexes puts all offers of affordability at the developer's option.
- The allowance for exceptions when an alternate design meets the "intent and purpose" of the PUD regulations allows room for interpretation in negotiations with the City.

**Developer Design Standards negatives:**

- There are City expectations of certain design elements, amenities, and affordability.
- **General discussion of concepts that have been presented related alternatives to the City's IZO.**
  - Discussed below
- **General discussion regarding process for commission meetings, including review of recommended Affordable Housing Agreements.**
  - See above regarding processing for Affordable Housing Agreements.

**Regarding alternatives for addressing the IZO, the following have been discussed recently:**

- **Amend the IZO to remove specific affordability requirements in favor of more generic language indicating the City will use its “best effort” to obtain rent restricted housing as part of a new development.**

- The City gives up on the idea of adopting standards and requirements on land zoned for the purpose of providing affordable workforce housing?

- **Focus on obtaining project amenities, such as computer centers, libraries and recreational facilities that maybe beneficial to lower income housing.**

- We should pursue these worthwhile amenities within the context of effective housing policy. They are not a substitute for affordable housing.

- **Explore the implementation of vacancy decontrol for a specific number of lower income households.**

- The City gives up on controlling land use to provide affordable housing over time.

- **Explore potential for providing housing for lower income households without implementing rent restrictions.**

- Modify the current IZO offsite development and land dedication alternatives to create mixed income neighborhoods rather than buildings.
- Prohibit rent restricted units in market rate developments on property zoned 30 units+/acre.
- On property zoned 30+units/acre, restrict contributions from the LIHF to qualified nonprofit housing providers in order to assure efficient and transparent use of these limited funds.

**SUGGESTION FOR DISCUSSION:**

Replace the IZO with a new zoning category:

**"Nonprofit High Density Residential, Mixed Income" (NHDRMI)**

All properties the City identifies as suitable for high density residential development (30+units/acre) in the Housing Element update process would receive NHDRMI zoning. In addition, other property owners not so identified could apply for this zoning on all or a portion of their property. This would be the only HDR zoning available in Pleasanton greater than 23 units/acre.

Requirements for developing with NHDRMI zoning would be:

- A qualified nonprofit housing provider, hired by the property owner to create a plan for the site.
- The nonprofit would provide at least 40% of the site's residential units as affordable to low, very low, and/or extremely low income households on land dedicated by the property owner.
- The non-profit lead would select a for-profit developer to build market rate units on the site. At least 40% of the market rate units would be built at the same or greater density than the nonprofit units.

- The market rate portion of the development will be exempt from paying the LIHF.
  - Rents in the market rate portion of the development would have no restrictions.
  - The LIHF would provide financial assistance to the nonprofit housing project lead as outlined in the current IZO, or additional assistance as recommended by the Housing Commission and approved by Council.
  - The City would expect and facilitate the nonprofit and for-profit developer(s) to cooperate in the creation of an attractive, mixed income neighborhood including shared amenities for workforce families and singles consistent with the Housing Element Goals and Policies (See suggestions for HE modifications attached.)
- **Shift attention from inclusionary units to maximizing affordable housing fee payments/revenue to purchase or construct unit affordability.**
    - We should have a plan for determining fees (not entirely raised from new residential and commercial development), based on a housing plan that creates a jobs/housing balance at the limit of our wastewater export capacity. Based on historic RHNA Pleasanton should plan for approximately 25% Extremely Low and Very Low Income housing, 20% Low Income housing, 20% Moderate Income housing, (provided by market rate development), and 35% Above Moderate Income housing at buildout. —Or whatever a nexus study determines Pleasanton's needs will be based on the LIHF Nexus Study.
  - **Complete the Lower Income Housing Fee Nexus Study.**
    - Please

Thank you for reviewing these thoughts, ideas, and suggestions. We look forward to seeing you on April 9.

Very sincerely,

**Becky Dennis**

Citizens for a Caring Community

## ATTACHMENT 1

### Pertinent Housing Element Goals and Policies Review and Suggestions for Modifications

**Policy 4:** Give favorable consideration for approval for proposed developments which provide extremely low-, very-low- and low income units that meet the requirements of the Inclusionary Zoning Ordinance, as long as all other City development standards are met.

#### *Suggested edits*

**Policy 4:** Give favorable consideration for approval for proposed developments which provide extremely low-, very-low- and low income units. ~~that meet the requirements of the Inclusionary Zoning Ordinance, as long as all other City development standards are met.~~ make a proportional contribution to meeting Pleasanton's defined affordable housing need, and meet Development Standards and Design Guidelines.

**Goal 5:** Produce and retain a sufficient number of housing units affordable to extremely low-, low- and very-low-income households to address the City's responsibility for meeting the needs of Pleasanton's workforce, families, and residents, including those with special needs.

#### *Suggested policy and program additions for Goal 5:*

**Policy:** Require all parcels identified as suitable to develop at 30+units/acre to accommodate Pleasanton's RHNA for extremely low, very low, and low income households to be zoned "Nonprofit High Density Residential, Mixed Income" (NHDRMI). Such parcels are intended to be planned and developed under the supervision of a qualified nonprofit builder/manager to provide at least 40% of the residential units as low, very low, and extremely low income housing. A maximum of 60% of the residential units shall be constructed by a for-profit developer and rented or sold as unrestricted market rate units. At least 40% of the market rate housing units shall be built at the same or greater density as the nonprofit housing. Development plans shall strive for an attractive neighborhood design that minimizes income differences among residents, and features shared amenities to facilitate neighborhood and community activities.

**Program:** Determine qualification standards for nonprofit housing providers who will work with property owners, for-profit builders, and the City to plan and develop parcels zoned NHDRMI.

**Program:** Conduct outreach to recruit nonprofit housing organizations to encouraging them to apply for qualification to participate in the development of land zoned NHDRMI

**Program:** Conduct outreach to property owners of land zoned, or that may potentially be zoned NHDRMI to familiarize them with qualified.

**Goal 6:** Promote the production of housing affordable to extremely low-, low- and very-low-income households by actively working with and creating incentives for non-profit housing developers.

**Suggested policy and program additions for Goal 6:**

**Policy:** Provide assistance to nonprofit housing organizations in forming successful working and management partnerships with for-profit housing developers on parcels zoned NHDRMI.

**Program:** Use the LIHF and/or Pleasanton staff to assist qualified nonprofits in drafting agreements related to preservation of affordable units in perpetuity, ensuring successful partnerships with for-profit builders sharing site development, and other issues related to achieving the Housing Element's Goals and implementing its Policies.

**Program:** (Contingent on completion of Program 9.6, which could incorporate this Program) Provide density bonuses to nonprofits working on sites zoned NHDRMI in order to enhance the site's ability to provide affordability and/or to increase the financial feasibility of development.

**Program:** Allocate additional resources as necessary to expedite comprehensive plan processing and public review.

**Policy 10:** Would be consistent with the suggested Programs above.

**Goal 10:** Remove unnecessary governmental constraints to the provision of housing affordable to extremely low-, low- and very low-income households and associated public services and facilities.

**Suggested policy and program additions for Goal 10:**

**Program 14.3:** Expedite the development review process for housing proposals affordable to moderate-, low-, extremely low, and very-low-income households.

**Suggested edits**

**Program 14.3:** Expedite the development review process for housing proposals affordable to low- and very-low-income households, and for moderate income households in projects with NHDRMI zoning.

**Policy 16:** ~~Ensure compliance with the Inclusionary Zoning Ordinance by requiring each for-sale residential and non-residential development to which the Ordinance applies to include its pro-rata share of housing needs for low- and very low-income households or, if the Ordinance criteria are met, to contribute to the lower income housing fund to facilitate the construction of housing affordable to extremely low, low-, very-low, and moderate income households.~~ Review and modify policies for rental housing to conform with the Costa Hawkins Act. ~~It is strongly encouraged that the Inclusionary Zoning Ordinance requirements be met by building housing affordable to extremely low, low- and very-low-income households.~~

## ATTACHMENT 1 – page 3

### *In Process...*

**Program 16.1:** Monitor the results of the Inclusionary Zoning Ordinance annually to determine if developers are primarily building new housing units affordable to low- and very-low-income households instead of paying in-lieu fees for new developments. If it is determined by the City Council, upon recommendation by the Housing Commission, that the Inclusionary Zoning Ordinance is not producing sufficient housing affordable to low- and very-low-income households, consider modifying the Ordinance so that it can better achieve that objective. As part of the inclusionary ordinance review, conduct meetings with developers to identify specific changes that may be considered by the City.

### *In Process...*

**Program 16.2:** Review the City's Inclusionary Zoning Ordinance and amend if required:

- for consistency with the Housing Element and other City affordable housing programs;
- to identify incentives for non-profit housing developers and other housing developers to construct projects including three bedroom units for large households;
- to determine if it is appropriate to increase the percentage of affordability to support housing affordable to low- and very-low-income households;
- to be consistent with recent court decisions regarding rental housing;
- as a potential constraint to housing

### *Suggested edits*

**Program 17.3:** Use the Lower-Income Housing Fund to help build housing affordable to low- and very-low-income households on City-owned land, land dedicated in lieu of payments to the LIHF, and to assist construction of nonprofit low, very low, and extremely low income housing on land zoned NHDRI to accommodate Pleasanton's RHNA.

**Goal 14:** Provide adequate locations for housing of all types and in sufficient quantities to meet Pleasanton's housing needs.

### *Suggested policies for Goal 14*

**Policy a:** Ensure that land zoned 30+ units/acre is zoned NHDRI and at least 40% of their residential units are affordable to low, very low, and extremely low income households.

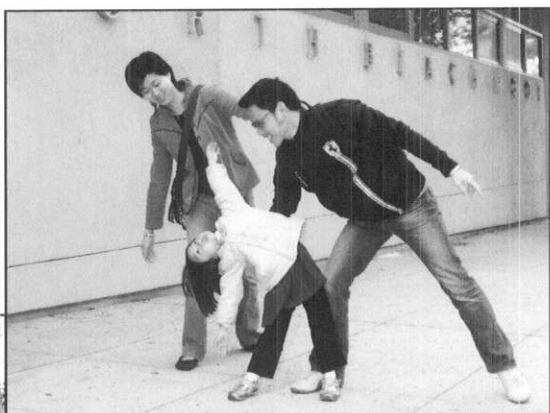
**Policy b:** Prohibit 100% for-profit housing development on land zoned at 30+units/acre.

# The Face of Affordable Housing in The Communities of Alameda

In 2010, "Fair Market Rent" for a two bedroom in Alameda County is \$1377 per month, affordable to households earning at least \$55,080 per year, or in other words **132 hours per week** at minimum wage.

Who lives in affordable housing?  
You may be surprised. Below are snapshots of representative households who could be served by affordable housing. To the left are pictures of residents that live in affordable homes all over the Bay Area.

Data is taken from Paycheck to Paycheck, produced by the National Housing Conference.



#### MODERATE-INCOME FAMILY PROFILE

Dad works as an elementary school teacher, mom works as a bank teller; they have two children.

Estimated annual income: \$90,855



#### LOW-INCOME FAMILY PROFILE

Dad works as an office building janitor, mom works as a child-care provider; they have two children.

Estimated annual income: \$61,996



#### VERY-LOW-INCOME FAMILY PROFILE

Mom works as a retail clerk and is the only source of financial support in her family; she has one child.

Estimated annual income: \$26,442



#### EXTREMELY-LOW-INCOME FAMILY PROFILE

A grandparent living alone on Social Security.

Estimated annual income: \$10,884

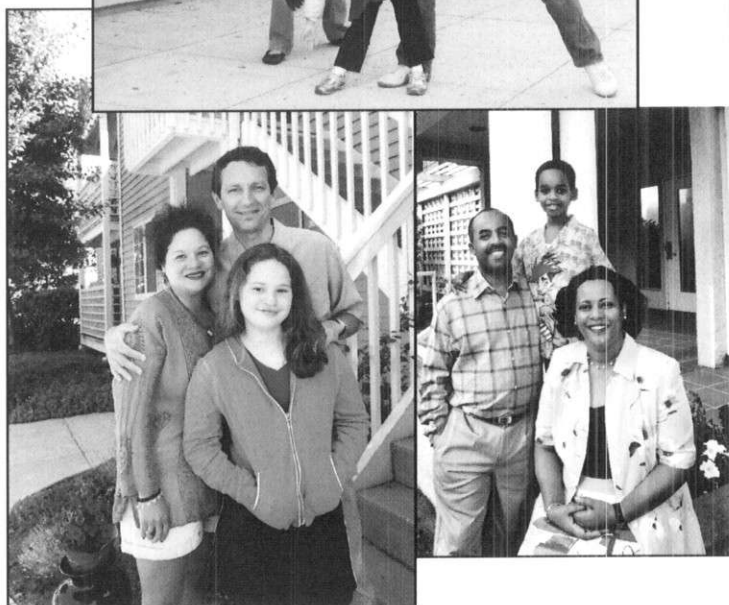


Photo Credits: Adam Hoffman (top photo),  
Nita Winters (bottom photos)

U.S. Department of Housing and Urban Development determines Fair Market Rents (FMRs) for federal housing assistance purposes. The FMR estimates the dollar amount at or below which 40% of standard quality rental housing units are rented (50th percentile used for higher housing costs). FMRs are based on distribution of rents paid by "recent movers," renter households who have moved within the past 15 months. FMRs include cost of shelter and utilities, excluding telephone service and adjusted for the number of bedrooms in the rental unit.

Income categories are based on geography and family size, as defined by the California Department of Housing and Community Development.

For more information, contact the Non-Profit Housing Association of Northern California, (415) 989-8160.

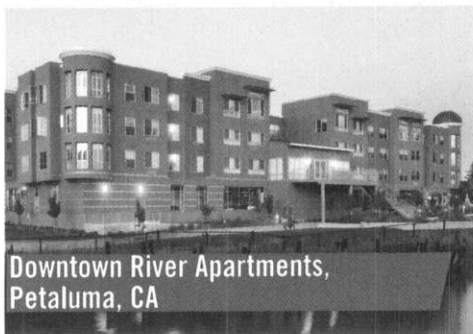
May 2010

# Let's Talk About CONTEMPORARY AFFORDABLE HOUSING

## WHO, WHAT, HOW & WHY

### WHAT DOES CONTEMPORARY AFFORDABLE HOUSING LOOK LIKE?

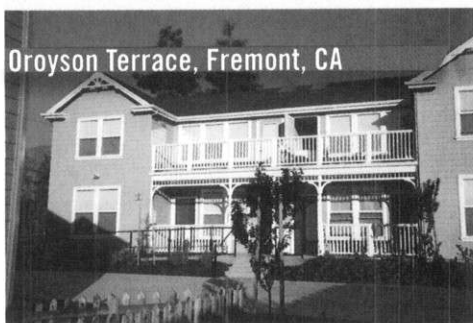
Contemporary affordable homes are designed and built with the character and style of the neighborhood in mind. Many have won design awards! Chances are you have walked right by an affordable home and not even known it.



Downtown River Apartments,  
Petaluma, CA



Broderick Place, San Francisco, CA



Oroyson Terrace, Fremont, CA

**The Non-Profit Housing Association  
of Northern California**  
369 Pine Street, Suite 350  
San Francisco, CA 94104  
[ph]415.989.8160  
[f]415.989.8166

[www.nonprofithousing.org](http://www.nonprofithousing.org)

Bay Area families face high costs of living, and housing is generally the greatest single expense. Not only do Bay Area families spend more of their income on housing costs than anything else, the proportion of their income that they spend on housing is lowering their overall quality of life.

### WHAT Does It Mean For Housing To Be "Affordable"?

By federal government standards, housing is considered "affordable" if households pay no more than 30% of their gross income for rent and utilities.

More than half of California's low income households pay more than 50% for their gross income for housing. Such severe overpaying creates bigger problems for lower-income and middle-income families. With a large portion of their household income going toward housing every month, it leaves less for essentials like food and medicine, forcing these families to make difficult choices.

### WHO Lives In Contemporary Affordable Housing?

People who earn less than their region's median income, from all walks of life, can apply. Affordable housing developers must certify specific income limits for their prospective residents as a condition of funding. Housing for "very low income" for example, is only available to households earning less than 50% of the area's median income. In the Bay Area this would include minimum-wage earners as well as entry level professions such as teachers and nurses.

### WHO Builds Contemporary Affordable Housing?

It is built by private developers, mostly non-profits, many of which are local, community or faith-based organizations. The buildings are funded through a combination of rental income, private funding and government subsidies.

### FOR MORE INFORMATION

*The Online Guide to State and Local Housing Policy*, Center for Housing Policy:  
[www.housingpolicy.org](http://www.housingpolicy.org)

*Myths and Facts About Affordable and High-Density Housing*, California Planning Roundtable & California Department of Housing and Community Development:  
[www.hcd.ca.gov/hpd/mythsnfacts.pdf](http://www.hcd.ca.gov/hpd/mythsnfacts.pdf)

*Busting the Five Myths of Affordable Housing*, The Campaign for Affordable Housing:  
[www.tcah.org/pdf/5Myths.pps](http://www.tcah.org/pdf/5Myths.pps)



## WHO LIVES IN CONTEMPORARY AFFORDABLE HOUSING?

**Affordable housing provides a stepping stone for young families,**



Jonathan, Monique, Marlena & Gene  
Almaden Lakes Apartments  
San Jose, CA

**A stable place for vulnerable people to get back on their feet,**



Jamie & Brenda  
Downtown River Apartments  
Petaluma, CA

**And a cost-effective situation for people with special needs.**



Priscilla  
Fremont Oak Gardens  
Fremont, CA

## WHAT does contemporary affordable housing look like?

These homes come in a variety of shapes and sizes, include single family homes and apartments, and are available through ownership or rental. Affordable housing developments are safe and healthy homes because they meet local building standards and design requirements; they have professional on-site management; and there are high standards for tenant selection.

## HOW Is Contemporary Affordable Housing Planned And Built?

Local governments are required to provide an adequate number of affordable homes for their population. They plan for it in their Housing Element process which includes public participation. Over the past few decades, many communities in the San Francisco Bay Area have created effective public/private partnerships among local government, non-profit housing developers, community leaders and private financial institutions to build attractive, successful affordable housing developments.

## WHY Do Communities Need More Contemporary Affordable Housing?

- Affordable housing takes care of the local workforce who might otherwise be priced out of the market. This includes minimum wage earners like food servers and retail clerks, as well as salaried public service workers like nurses, teachers and police officers.
- When people live near work, they reduce commute time thereby reducing regional traffic and air pollution. They also have more time to spend with their families and communities.
- Affordable housing can improve the neighborhoods and reduce sprawl. New or rehabilitated affordable homes revitalize an area because they are clean, safe and well-managed, often including attractive landscaping and play areas. Studies have shown that contemporary affordable housing not only serves its residents, but is an asset to the broader community.
- Studies demonstrate that children perform better academically and socially in school when they have a stable housing situation. Improving the quality of housing reduces stress for adults which improves employment stability and success as well as physical and mental health.
- In the past ten years the number of new rental homes has not even kept up with the number of rentals lost through conversion and demolition.
- Recent home foreclosures have pushed more people into the rental market. Combined with limited supply, this has led to steadily rising rents increasing the need for more contemporary affordable housing.

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## Home Sweet Home? Legal Challenges to Inclusionary Ordinances and Housing Elements

*Inclusionary Ordinances after Palmer and Patterson*

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## **I. Introduction**

Two published Court of Appeal decisions in the past six months, *Building Industry Ass'n of Cent. California v. City of Patterson* ("Patterson")<sup>1</sup> and *Palmer/Sixth Street Properties L.P. v. City of Los Angeles* ("Palmer")<sup>2</sup> have together upended previous understandings about the validity of, and appropriate analysis applied to, inclusionary housing ordinances. For the 170 communities in the State (nearly one-third of all cities) that had adopted inclusionary ordinances of some type by 2007,<sup>3</sup> complying with *Patterson* and *Palmer* while still producing affordable housing has become more difficult.

As a means to understand the issues raised in *Patterson* and *Palmer* and to develop a coherent response, this paper initially discusses the various characterizations of inclusionary ordinances as either exactions, rent and price controls, or police power land use ordinances. While most communities in the state have adopted inclusionary ordinances as land use controls, *Patterson* found an inclusionary in-lieu fee to be a type of impact fee, and *Palmer* found that restricting rents in new developments violates State rent control laws, even though the Los Angeles plan at issue was adopted as a land use control. (Both cases are discussed in detail in the companion paper presented by Alan Seltzer, and so not all of the facts and holdings are repeated here.) This paper finally discusses alternative strategies for modifying inclusionary ordinances to meet the current legal landscape and the numerous associated issues raised by the cases.

*Palmer* was decided less than a week before this paper was drafted, and the conclusions reached here should be considered preliminary. In particular, it is to be hoped that the California

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<sup>1</sup> 171 Cal. App. 4<sup>th</sup> 886 (2009).

<sup>2</sup> 2009 Cal. App. LEXIS 1186 (B206102, Second Appellate District, Div. 4, filed July 22, 2009)

<sup>3</sup> Non-Profit Housing Association of Northern California, *Affordable by Choice: Trends in California Inclusionary Housing Programs* at 5 (2007) (hereinafter "NPH 2007").

Supreme Court will accept review and engage in a far more robust analysis of the underlying issues than occurred in *Palmer*.

## **II. The Characterization of Inclusionary Ordinances**

Since the first inclusionary ordinances were adopted in the early 1970s, legal analysts have variously characterized the ordinances as run-of-the-mill land use controls (like zoning ordinances), as rent and price controls, and as “exactions” more akin to impact fees and land dedications.<sup>4</sup> Nationally, courts have taken all three positions. The *Palmer* case is the first where a California court has taken a definitive position (although still leaving unresolved the issue of whether the base inclusionary requirement is a land use control or an exaction).

### **A. Inclusionary Ordinances as Land Use Controls.**

From a city standpoint, it is most advantageous if inclusionary ordinances can be characterized as land use controls. As land use ordinances, they can then be enacted pursuant to ordinary state zoning legislation, and courts will apply the deferential rational basis test for local

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<sup>4</sup> See Thomas Kleven, Inclusionary Ordinances - Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing, 21 *UCLA L. Rev.* 1432, 1490 (1974). See also Barbara Ehrlich Kautz, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 *USF L.Rev.* 971, 975 (2002); Fred P. Bosselman et al., Panel Comments, in Inclusionary Zoning Moves Downtown 41-54 (Dwight Merriam et al. eds., 1985); Daniel R. Mandelker, The Constitutionality of Inclusionary Zoning: An Overview, in Inclusionary Zoning Moves Downtown 31, 35-36; William W. Merrill III & Robert K. Lincoln, Linkage Fees and Fair Share Regulations: Law and Method, 25 *Urb. Law.* 223, 274 (1993). Many commentators simply assume that inclusionary housing is an exaction. See Mark Fenster, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 *Calif. L. Rev.* 609, 657 (2004); Lawrence Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 *Neb. L. Rev.* 186, 221 (1991); Brian W. Blaesser, Inclusionary Housing: There's a Better Way, Inclusionary Zoning: Lessons learned in Massachusetts, 2 *NHC Affordable Housing Pol'y Rev.* 14, 15 (Jan. 2002); Susan M. Denbo, Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing, 23 *Real Estate L.J.* 7, 11 (1994); Robert C. Ellickson, The Irony of "Inclusionary" Zoning, 54 *S. Cal. L. Rev.* 1167, 1211 (1981). One recent author assumes that inclusionary zoning is a price control. See Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Housing Reclaimed:" How Effective Are Price Controls?, 33 *Fla. St. U. L. Rev.* 671, 672 (2005).

zoning established in *Euclid v. Ambler Realty Co.*<sup>5</sup> and applied by the California Supreme Court in *Associated Home Builders etc., Inc. v. City of Livermore*.<sup>6</sup>

The land use ordinance position has been most clearly adopted by the New Jersey Supreme Court, in *Southern Burlington County NAACP v. Township of Mount Laurel*.<sup>7</sup> The court rejected distinctions between socioeconomic and other zoning, noting that all zoning, such as that for "detached single family residential zones, high-rise multi-family zones of any kind, ... indeed[,] practically any significant kind of zoning" has inherent socioeconomic characteristics. The court held that, where a community's obligation to provide housing for all income groups could not be met by the removal of zoning restrictions, "inclusionary devices such as ... mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality...We know of no governmental purpose ... that is served by requiring a municipality to ingeniously design detailed land use regulations ... actually aimed at accommodating lower income families, while not allowing it directly to require developers to construct lower income units."<sup>8</sup>

In 1990, in *Holmdel Builders Ass'n v. Township of Holmdel*,<sup>9</sup> the New Jersey Supreme Court revisited the issue while reviewing the constitutionality of affordable housing fees required by several New Jersey cities. The court explained that "inclusionary-zoning devices," including inclusionary in-lieu fees, are land use ordinances that bear a "real and substantial relationship to the regulation of land" because they are specifically designed to help create affordable housing

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<sup>5</sup> 272 U.S. 365 (1926).

<sup>6</sup> 18 Cal.3d 582, 604-05 (1976).

<sup>7</sup> 456 A.2d 390 (N.J. 1983).

<sup>8</sup> *Id.* at 448-50.

<sup>9</sup> 583 A.2d 277 (N.J. 1990)

and will therefore affect "the nature and extent of the uses of land and of buildings. . . ." <sup>10</sup> Further, the court held that inclusionary in-lieu fees are not exactions similar to impact fees, because the affordable housing requirements are not based on the impact of a project, but rather on the "the relationship that . . . development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need . . . ." <sup>11</sup>

No court in California has resolved the issue or definitely characterized inclusionary ordinances as a land use control. In *Home Builders Ass'n v. City of Napa* <sup>12</sup> ("*Napa*"), the first published California case regarding inclusionary zoning, the City of Napa argued that its inclusionary ordinance was a land use ordinance that merely regulated the *use* of a small part of a development, and that inclusionary in-lieu fees were not impact fees because the underlying inclusionary requirement was not a monetary exaction, but rather a land use control, and fees were paid only at the election of the developer. <sup>13</sup> The Court of Appeals did not reach this issue.

Nonetheless, the *Napa* court's generally favorable comments about inclusionary zoning led most California practitioners to assume that inclusionary ordinances could be considered to be land use ordinances and adopted them as such, most commonly including findings regarding the need for affordable housing in the community (as documented in its housing element) and the strong State interest in affordable housing. <sup>14</sup> Certainly, the expansive interpretation of local police power and the State's interest in affordable housing appeared to support inclusionary housing as strongly in California as in New Jersey.

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<sup>10</sup> *Id.* at 286-97.

<sup>11</sup> *Id.* at 288.

<sup>12</sup> 108 Cal. Rptr. 2d 60 (2001).

<sup>13</sup> See Brief of Amicus Curiae in Support of Respondent City of Napa at 9, *City of Napa* (Cal. Ct. App. 1<sup>st</sup> Dist.) (No. A090437); memorandum of Points & Authorities in Support of Defendant City of Napa's Demurrer at 17, *Home Builders Ass'n v. City of Napa* (Napa County Super. Ct.) (No. 26-07228).

<sup>14</sup> See, e.g., Government Code Sections 65580, 65581, and 65582.1.

Using the same logic adopted by the New Jersey courts and argued in *Napa*, in-lieu fees have usually been based on the dollar subsidy required to provide the same number of inclusionary units, at the same income levels, as would otherwise be constructed on the site. (In practice, most in-lieu fees have been set at a significantly lower amount than is actually needed to provide the same number of units.<sup>15</sup>) While this author has long been concerned that allowing an in-lieu fee alternative invites the courts to treat the entire inclusionary program as a development exaction rather than as a land use control (communities do not collect in-lieu fees as an alternative to setbacks and height limits), the California Supreme Court's approval of an art in public places fee provided at least some support for the concept that an in-lieu fee alternative would not automatically convert a zoning requirement to an exaction. In *Ehrlich v. City of Culver City*<sup>16</sup> ("*Ehrlich*"), the Court reviewed a Culver City ordinance that required every development to include a piece of art equal to 1 percent of the building valuation or pay an equivalent fee to the City. The Court held unanimously that the fee was *not* a development exaction but rather an "aesthetic condition" akin to traditional land-use regulations such as setbacks, parking, lighting, and landscaping. While it might be questionable whether the Court would apply the same analysis to an inclusionary ordinance that restricts prices and rents and has no aesthetic component, the combination of *Napa* and the *Ehrlich* gave practitioners a fair amount of confidence in the strategy.

The inclusionary requirement and alternative in-lieu fee established in Los Angeles' Central City West Specific Plan and challenged in *Palmer* was adopted as a land use control: it was based on a study showing high rates of poverty, a need for affordable housing in the Specific

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<sup>15</sup> See Non-Profit Housing Association of Northern California and California Coalition for Rural Housing, *Inclusionary Housing in California: 30 Years of Innovation* at 17 – 19 (2003).

<sup>16</sup> 12 Cal. 4<sup>th</sup> 854, 885-86 (1996). The case is discussed in depth in Alan Seltzer's paper.

Plan area, and development practices that had removed one-third of the affordable housing in the Plan area. The Specific Plan required that 15 percent of new units be affordable or that an in-lieu fee – calculated as the cost equivalent of building the units – be paid. Where low-income units had been demolished on the site, the Specific Plan alternatively required that they be replaced. In Palmer's case, this resulted in an inclusionary requirement of about 18 percent. The Plan offered density bonuses and other development incentives (not accepted by Palmer) in exchange for the affordable units. In *Palmer*, the City asserted that its inclusionary requirements were land use controls rather than rent controls governing the entire rental housing market – a defense rejected by the Court of Appeal. While not disagreeing that the requirements (imposed through a specific plan) were land use controls, the Court found that so long as the requirements restrict rents, they must comply with State rent control statutes.<sup>17</sup>

Since both the inclusionary requirement and the in-lieu fee were found in *Palmer* to be preempted by State law as applied to a *rental* project, clearly the "land use control" model can no longer be used to require affordable rental units. This will have a major impact on inclusionary housing practice, because of the inclusionary units surveyed in 2007, 71 percent were rentals.<sup>18</sup> While the land-use theory may retain some validity for units offered for sale, the *Patterson* case (discussed in the next section) has made it questionable whether in-lieu fees can avoid analysis as impact fees.

#### B. Inclusionary Ordinances as Exactions

The development community and many published analyses of inclusionary zoning have

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<sup>17</sup> In particular, the Court held that the inclusionary provisions must comply with Civil Code Sections 1954.51 – 1954.535 (Costa Hawkins Act). The case is discussed in detail below.

<sup>18</sup> NPH 2007, *supra* note 3, at 15.

simply *assumed* that inclusionary requirements are development exactions (see footnote 4 above). Home builders, developers, and, in particular the Pacific Legal Foundation, have brought a series of cases<sup>19</sup> attacking inclusionary ordinances on various grounds (including equal protection, substantive due process, etc.) but in particular designed to bring the ordinances under the intermediate scrutiny prescribed by the U.S. Supreme Court's *Nollan/Dolan* decisions. In California, there has also been an effort to bring inclusionary requirements (particularly in-lieu fees) under the purview of the Mitigation Fee Act. (Alan Seltzer's companion paper provides an excellent analysis of these cases and issues.) The goal has been to treat inclusionary requirements as impact fees and to require a nexus-type study to justify them, in order to make it more difficult for jurisdictions to impose these requirements. As stated in one law review article:

If the exactions rules did apply to [inclusionary] programs, . . . jurisdictions would have to make difficult, individualized demonstrations of the connection between the proposed project and an increase in the affordable housing shortage, and demonstrate proportionality with the percentage of affordable units or fees required. Demonstrating nexus and proportionality would not be impossible insofar as each new unit of market-priced housing in an expensive region boosts the need for service workers who cannot afford to pay market prices in such an area. Nevertheless, a burden of showing nexus and proportionality would raise the costs and risks for local governments that rely on inclusionary zoning as a tool for addressing affordable housing crises.<sup>20</sup>

Until *Patterson*, these efforts were generally unsuccessful. That is in part because the litigants were somewhat entranced by *Nollan/Dolan* and based their litigation strategy (in *Napa* and in *Action Apartment Ass'n v. City of Santa Monica*,<sup>21</sup> for example) on subjecting inclusionary ordinances to *Nollan/Dolan* rather on characterizing inclusionary requirements as

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<sup>19</sup> *Napa* and *Action Apartment Ass'n v. City of Santa Monica*, discussed in detail in Alan Seltzer's paper, were both litigated by the Pacific Legal Foundation. *Mead v. City of Cotati*, 2008 U.S. Dist. LEXIS 94238, and *Kamaole Pointe Dev. L.P. v. County of Maui*, 573 F. Supp. 2d 1354 (Dist. Hawaii (2008)), also litigated by the PLF, have been appealed to the Ninth Circuit. Other challenges settled prior to a published decision have been filed against Sacramento County and the City of San Diego by the BIA or developers.

<sup>20</sup> Fenster, *supra* note 4, at 657.

<sup>21</sup> 166 Cal. App. 4<sup>th</sup> 456 (2008).

exactions. Since the California Supreme Court has limited *Nollan/Dolan* to exactions required on an individualized basis as a condition for development,<sup>22</sup> and the inclusionary requirements being challenged were generally applicable legislative enactments, the Court of Appeal consistently rejected the effort to apply *Nollan/Dolan*.

In *Patterson*, however, the Court of Appeal instead applied the more deferential "reasonable relationship" test to an inclusionary in-lieu fee, assuming that it was a generally applicable impact fee and without ever considering (at least in the published opinion) whether the underlying requirement was an exaction or a land use requirement. There are many odd facts about *Patterson* that have led practitioners to believe that it could be distinguished from most inclusionary in-lieu fees in a properly briefed case: the case arose in the context of interpreting a development agreement that required fees to be "reasonably justified;" the fee was calculated based on the cost of subsidizing the City's *entire* regional housing need, not just the affordable housing that would otherwise have been included in the project; the argument was apparently never made that basic inclusionary requirement was similar to the art in public places requirement reviewed in *Ehrlich*.<sup>23</sup> Nonetheless, the language in *Patterson* characterizes the in-lieu fee as not substantively different from an affordable housing fee reviewed in *San Remo Hotel v. City and County of San Francisco* ("*San Remo*")<sup>24</sup> and subject to the requirement that there be a reasonable relationship between the amount of the fee and the "deleterious public impact of the development." The *San Remo* fee in fact *was* an impact fee: it was intended to mitigate the impact on the City's affordable housing supply caused by the conversion of residential hotels to tourist hotels. However, because the language in *Patterson* characterizes an

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<sup>22</sup> See *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4<sup>th</sup> 952, 966-67.

<sup>23</sup> However, this author has not reviewed the *Patterson* briefs.

<sup>24</sup> 27 Cal.4<sup>th</sup> 643, 670-71 (2002).

in-lieu fee as an impact fee, any community that wishes to continue to characterize its in-lieu fee as a land use control akin to the *Ehrlich* art in public places fee will need to be prepared to defend their fees against a challenge that their analysis does not comport with the language in *Patterson*, nor is it like the impact fee that was reviewed in *San Remo*. Developers have viewed *Patterson* as a significant victory. ("[T]he *Patterson* decision provides a powerful new tool for developers to use in challenging affordable housing in lieu fees...cities or counties must show that the fees are reasonably related to impacts being created by the new market rate development."<sup>25</sup>).

The effort by the building industry to characterize inclusionary ordinances as exactions has been known for years, yet few communities have completed nexus studies to support their inclusionary and in-lieu fee requirements. In retrospect, this seems surprising, since cities are familiar with the procedural requirements for impact fees and exactions and this may be a “safer” alternative. There are several explanations:

- Affordable housing advocates have disfavored nexus studies because they often result in reduced affordable housing requirements, especially in less wealthy communities. (In general, the wealthier the community, the higher percentage of affordable housing that can be justified.)
- The methodology for completing these studies is not as developed as that for, say, traffic impact fees.<sup>26</sup>

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<sup>25</sup> Cox Castle Nicholson, "Court Holds that Affordable Housing In Lieu Fees Must be Reasonably Related to the 'Deleterious Impact' Caused by New Market Rate Housing" (March 3, 2009).

<sup>26</sup> Nexus studies typically show that the construction of market-rate housing contributes to the need for affordable housing by increasing household spending in a community and so creating low-wage jobs – the kind of job creation that redevelopment plans anticipate when they facilitate downtown housing in order to create a market for local-

- Nexus studies are expensive.

Nonetheless, the relative simplicity of the exactions approach (see discussion below) and its ability to resolve both *Patterson* (by showing that the fee is related to the deleterious impact of the project) and *Palmer* (by replacing a requirement for on-site units with an impact fee) may make this the majority approach.

### C. Inclusionary Ordinances as Rent or Price Control

A potential conflict between inclusionary zoning and rent control statutes – in particular, the Costa-Hawkins Act<sup>27</sup> – has been recognized for some time.<sup>28</sup> As early as 1998, a lawsuit claiming a conflict between inclusionary requirements and the State Costa-Hawkins Act was filed against the City of Santa Monica and settled by the City.<sup>29</sup> Nonetheless, based on the court decisions in New Jersey and the legislative history of the Costa-Hawkins Act, there was some hope that the California courts would agree that inclusionary controls on rents did not constitute rent control.

Conflicts with State Statutes Regulating Rent Control. Rationales presented for distinguishing inclusionary ordinances from rent control statutes include inclusionary zoning's remedial character as a response to exclusionary zoning; its application to a small portion of new development *only* rather than to existing apartments; its inclusion of both rental and ownership

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serving activities such as supermarkets. An alternative nexus theory, more difficult to quantify, is that market-rate projects use up land that would otherwise be available for affordable housing. In a case involving commercial linkage fees, the Ninth Circuit discussed the "indirectness of the connection between the creation of new jobs and the need for low-income housing," but ultimately concluded that the fees bore a "*rational relationship* to a public cost closely associated with" new development. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874-76 (9<sup>th</sup> Cir. 1991).

<sup>27</sup> Civil Code Sections 1954.51 – 1954.535.

<sup>28</sup> See California Affordable Housing Law Project & Western Center on Law & Poverty, *Inclusionary Zoning: Legal Issues* at 24-29 (December 2002) (hereinafter "Legal Issues"); Kautz, *supra* note 4, at 1015-17; Nadia El Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?* 89 Cal. L.Rev. 1847 (2001).

<sup>29</sup> See Mallakh, *id.*, at 1851.

housing; and its screening of owners and tenants (at least initially) to ensure that they are lower income households. In *Napa*, the plaintiffs had asserted that the City's ordinance was a rent control ordinance that violated the due process clause because it required the sale or rental of ten percent of housing units at a fixed price without any provision for a fair return on investment to the developer. While not resolving whether a fair rate of return was required, the Court of Appeal found that Napa's ordinance was not an ordinance that "require[d] property owners who develop residential housing to sell or rent 10 of their units [to low income individuals]," (i.e., was not a rent control ordinance) because any person who did not want to sell or rent a portion of his or her housing units to low income individuals could choose one of the numerous alternatives included in the ordinance, such as paying an in lieu fee or donating land.<sup>30</sup>

In 2000, the Colorado Supreme Court found that a similar ordinance was, indeed, a rent control law.<sup>31</sup> The Town of Telluride's ordinance required developers to create housing affordable to forty percent of the employees generated by the development. The developer could satisfy the requirement by constructing new housing with controlled rents, paying fees, or dedicating land. Even though the developer was not required to provide rent-controlled units, the Colorado court found that the Telluride ordinance set a base rent and strictly limited rent increases and that the "scheme as a whole operated to suppress rental values below their market values," violating the "plain language" of the Colorado statute prohibiting rent control. Similarly, in 2006 a Wisconsin appellate court found that an inclusionary ordinance adopted by the City of Madison violated the "plain language" of a Wisconsin statute prohibiting local rent control, despite state policies encouraging cities to provide housing affordable to all income levels. The

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<sup>30</sup> *Napa* at 199.

<sup>31</sup> See *Town of Telluride v. Lot Thirty-Four Venture L.L.C.*, 3 P. 3d 30, 35 (Colo. 2000).

court observed that, "local governments may not choose a means of achieving that goal that is prohibited."<sup>32</sup>

The Court of Appeal's decision in *Palmer* uses language very similar to that in the Colorado and Wisconsin cases. The state Costa-Hawkins Act provides that, barring an exception, for any building completed after February 1, 1995, "an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or unit."<sup>33</sup> The *Palmer* court held that the language of the statute was "clear and unambiguous" and that forcing Palmer to provide affordable housing at regulated rents was "clearly hostile" to his right under Costa-Hawkins to establish the initial rental rate for the dwelling unit. Further, in an analysis similar to the Colorado court's treatment of Telluride's fee and dedication alternatives, and without any acknowledgement of the contrary language in *Napa*, the Court found that because the objective of the Specific Plan was to impose affordable housing requirements and the amount of the fee was based on the number of affordable units required, the in-lieu fee option was "inextricably intertwined" with the preempted rent control option and similarly preempted. The Court went even further and stated in a footnote that if the base requirement had been a fee, with voluntary provision of rental affordable units as an alternative, both the fee and the *voluntary* provision of units would be part of "an overall plan that is preempted by [Costa Hawkins]" and illegal.

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<sup>32</sup> See *Apt. Ass'n of S. Cent. Wis., Inc. v. City of Madison*, 722 N.W.2d 614 (Wi. Ct. App. 2006).

<sup>33</sup> Cal. Civ. Code Section 1954.52(a)(1). There is a fair amount of evidence that Costa-Hawkins was never intended to apply to inclusionary ordinances. Mike Rawson of the California Affordable Housing Law Project stated in an interview that Costa-Hawkins proponents specifically asserted that the bill would not cover inclusionary units. However, he acknowledges that no such agreement is reflected in the legislative history. (Telephone Interview with Michael Rawson, Nov. 12, 2001.) See also Mallakh, *supra* note 28, at 1870-72. Mallakh also discusses the numerous statements of the bill's authors that Costa-Hawkins would affect only the five California cities that did not permit vacancy decontrol (Berkeley, Santa Monica, West Hollywood, Cotati, and East Palo Alto), see *id.* at 1870 n.149, although 64 cities at the time had inclusionary programs, and notes that nowhere in the legislative history was the act described as having a "prohibitive effect" on inclusionary programs. See *id.* at 1871 n.154.

For cities, there is now only one relevant exception to Costa Hawkins, which does not apply when "[t]he owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in [density bonus law, commencing with Government Code Section 65915]." <sup>34</sup> In the absence of financial assistance or another incentive, it is questionable whether a voluntary agreement to provide rent-controlled units could be enforced. <sup>35</sup>

Inclusionary Ordinances as Rent and Price Controls. The *Palmer* court's characterization of inclusionary zoning as a rent control could result in the characterization of controls on ownership units as price controls. If the courts begin to classify inclusionary ordinances as price controls, a different set of constitutional standards would prevail. The issue was raised in *Napa* but not resolved.

A price control is considered constitutional so long as it is not "confiscatory, i.e., ... fails to permit a landlord a fair rate of return." <sup>36</sup> However, prices for inclusionary units are not based on "fair return" concepts but on prices that are affordable to moderate and lower income families. The formulas used to set affordable prices have nothing to do with land costs, prices of market-rate units, financing, construction costs, or other factors that affect the developer's rate of return.

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<sup>34</sup> Civil Code Section 1954.52(b).

<sup>35</sup> While it would normally be assumed that a developer could agree to provide affordable rental housing as part of a development agreement, communities may want to include a term in their development agreements expressly stating that developer has agreed to limit rents in exchange for the regulatory incentives included in the development agreement.

The case also raises the question of the validity of existing agreements requiring the provision of rent-controlled housing when no city incentives were provided. We will attempt to discuss this issue in our panel discussion, but there has not been time to address this issue in this paper.

<sup>36</sup> *Santa Monica Beach, Ltd. v. Superior Court*, [P 998]

In *Pennell v. City of San Jose*,<sup>37</sup> the U.S. Supreme Court reviewed a constitutional challenge to a San Jose rent control ordinance based on a provision that permitted the City to *consider* "hardship to a tenant" when setting rents but did not *require* a reduction. The Court held that the provision was not unconstitutional absent any evidence of its actual impact.

*Pennell* appears to stand for the proposition that price controls cannot be challenged on their face unless they actually deny an owner a fair return. However, inclusionary provisions could be subject to rate of return analysis if viewed as price controls. Whether a court would review the rate of return for only the inclusionary units (likely negative) or for the entire project (likely positive) is unknown, since no court in California has applied such an analysis to a development project.

Conflicts with Other Statutes. The *Palmer* decision potentially conflicts with the Mello Act,<sup>38</sup> which requires that every new housing development in the coastal zone, "where feasible," provide housing affordable to low and moderate income households and also requires that all housing demolished in the coastal zone and formerly occupied by low and moderate income households be replaced within three years (subject to certain exceptions) or that the developer pay an in-lieu fee. Developers of new rental housing in the coastal zone will certainly argue that, given *Palmer*, it is no longer "feasible" for them to be required to provide affordable housing, and those who need to pay an in-lieu fee may argue that it is tainted by an on-site rent-controlled alternative. Although the issue was raised in the briefs, the *Palmer* court ignored it.

In addition, Government Code Section 65589.8 *specifically* allows developers who are required to provide inclusionary units to use rentals to provide all or some of the units:

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<sup>37</sup> 485 U.S. 1 (1988).

<sup>38</sup> Government Code Section 65590-65590.1.

A local government which adopts a requirement in its housing element that a housing development contain a fixed percentage of affordable housing units, shall permit a developer to satisfy all or a portion of that requirement by constructing rental housing at *affordable monthly rents*, as determined by the local government.

Nothing in this section shall be construed to expand or contract the authority of a local government to adopt an ordinance, charter amendment, or policy requiring that any housing development contain a fixed percentage of affordable housing units. (emphasis added)

This statute was not cited in either the City's or the amicus brief, but would appear to have no meaning at all if – as concluded in *Palmer* – rent control is only permitted pursuant to a agreement in exchange for money or incentives.<sup>39</sup> Perhaps one way to reconcile the two statutes and the Court's holding is to classify the developer's ability to substitute rental units for ownership units as an *incentive* provided pursuant to density bonus law (see discussion below).

### **III. Options for a Defensible Inclusionary Ordinance**

This section describes some initial ideas for creating a defensible inclusionary ordinance in the wake of *Palmer* and *Patterson* and discusses various associated issues. The discussion should be considered preliminary and subject to change.

#### **A. Don'ts.**

In light of *Palmer* and *Patterson*, some past inclusionary practices are no longer permitted:

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<sup>39</sup> This provision would also appear to provide ammunition to the argument that Costa Hawkins was never intended to apply to inclusionary ordinances, since the wording of this provision does not contain any acknowledgement that rent control provisions might apply to inclusionary ordinances.

- *Don't* require affordable *rental* housing in any newly created units (but see below regarding impact fees for rental units and requirements when condominium maps have been recorded).
- *Don't* include new affordable rental housing in a menu of options to meet affordable housing requirements (except as described in the next bullet). Including price-restricted rental housing in the program risks having the entire inclusionary scheme deemed "an overall program preempted by" Costa Hawkins.
- *Don't* enter into a voluntary agreement to restrict rents *unless* the builder receives either money or an incentive provided in density bonus law, *and* agrees by contract to restrict rents. An agreement limiting rents without money or an incentive as consideration may not be enforceable, since it does not comport with the precise language of Costa Hawkins.
- *Don't* calculate inclusionary in-lieu fees by dividing the total cost of subsidizing the City's entire fair share (RHNA) housing obligation by the number of units remaining to be built in the City (as was done by the City of Patterson).

#### B. The Pure Exactions Approach

The option that is conceptually the easiest to understand would treat all inclusionary requirements as exactions and/or impact fees. This would resolve the issues raised in *Patterson* and would convert all requirements for rental housing to an impact fee in response to *Palmer*. In this model, communities would:

- Complete a nexus study showing how the construction of market-rate housing contributes to the need for affordable housing. Generally such a study looks at the need created by different housing types (single-family homes, medium- and high-density multifamily, rentals v. ownership housing).
- Impose a housing impact fee on new rentals (usually a dollar amount per sq. ft.).
- Allow rental developments to provide on-site affordable housing only pursuant to a contract reciting financial or other incentives provided to the development.
- Determine an inclusionary percentage for ownership housing based on the nexus study. If it is desired to have an impact fee as an alternative, also determine the fee based on the nexus study.

Such an ordinance would be very similar to existing inclusionary ordinances, except that only an impact fee would be required for new rental housing.

#### C. The Mixed Exactions/Land Use Approach

Another approach uses the exactions approach for rentals and the land use control approach for ownership housing. Its treatment of rental housing is identical to that in the previous option.

- Complete a nexus study for rental housing only.
- Impose a housing impact fee on new rentals (usually a dollar amount per sq. ft.).

- Allow rental developments to provide on-site affordable housing only pursuant to a contract reciting financial or other incentives provided to the development.
- Retain existing on-site inclusionary requirements for ownership units as land use controls, with any in-lieu fee equal to the cost of providing the units elsewhere and with language stating clearly that the fee is not an impact fee. However, the in-lieu fees would remain subject to attack under *Patterson* and would need to be differentiated from the affordable housing in-lieu fees analyzed in *San Remo*. An option is to simply require that the units be provided on site and not include an in-lieu fee option.

One advantage of this structure may be that the city can amend only those portions of its ordinance related to rental housing, saving its existing provisions for ownership housing from a facial attack.<sup>40</sup> In addition, if the courts agree that the on-site requirements are land use controls, they will be subject only to the highly deferential “rational basis” test. However, as Alan Seltzer's paper states, once a nexus study is completed, it would be hard to avoid its conclusions regarding the justification for the fee in-lieu of producing housing on-site. As a final variation, this result can be avoided by removing rental housing without recorded condominium maps from all affordable housing requirements and retaining only provisions for ownership housing.

#### D. Random Considerations

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<sup>40</sup>See *Buena Park Motel Assn. v. City of Buena Park* (2003) 109 Cal. App. 4th 302, 308, holding that plaintiffs were precluded from challenging portions of a later-adopted ordinance that were “not altered” from an earlier ordinance.

Based on our review to date of *Palmer's* implications, here are additional thoughts on issues raised by the case. Because of the many issues, the discussion in most instances is cursory and intended primarily to alert practitioners to the issue.

Projects with Condominium Maps that Are Initially Rented. Developers of rental housing often record a condominium map at the time of construction so that they may be able to avoid the terms of a condominium conversion ordinance when and if they decide to sell the units. Even if the developer at the time of approval intended to sell the units, market conditions may require developers to rent for a time. The issue is whether these units could be subject to a local inclusionary ordinance.

There does not seem to be an obstacle to requiring as a condition of map approval that the developer provide a proportion of the units as ownership affordable units (assuming that this requirement is contained in the General Plan, zoning ordinance, or other generally applicable ordinance). As an option, the developer could be permitted to provide the units as rentals by entering into an agreement that meets the requirement of the Costa Hawkins exception (including City provision of a financial or regulatory incentive). This requirement withstood a challenge in the *Action Apartment Assoc. v. City of Santa Monica* case discussed in Alan Seltzer's accompanying paper.<sup>41</sup> Santa Monica automatically waives two taxes for required affordable housing units so that each project receives an incentive and also allows affordable units to receive density bonuses and incentives pursuant to State density bonus law (Section 65915). The rental option itself could also be defined as an incentive in an effort to reconcile Costa-Hawkins (which does not allow rent control unless the developer has received an incentive) and

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<sup>41</sup> See Santa Monica Municipal Code Sections 9.56.050(a) and (b) and 9.56.090 (fee waivers).

Government Code Section 65589.8 (which allows the developer to provide rentals as inclusionary units).

Limited Discretion to Avoid *Nollan/Dolan*. The deferential “reasonable relationship” test for impact fees and other exactions applies only to “legislatively mandated, formulaic mitigation fees” and not to ad hoc individualized exactions, which are subject to *Nollan/Dolan* scrutiny.<sup>42</sup> Consequently, an ordinance that has alternatives (such as dedication of land and off-site construction) needs to define them precisely so that the requirements are, in fact, “formulaic.” There has been a tendency regarding inclusionary ordinances to provide more and more options with more and more “flexibility.” At some point this will transform the inclusionary requirements into ad hoc exactions, which will make them more vulnerable to attack and transfer the burden of proof to the City.

Compliance with the Mitigation Fee Act. There have been repeated claims (beginning with *Napa*) that the imposition of in lieu fees or even inclusionary requirements must comply with the Mitigation Fee Act (“MFA”).<sup>43</sup> Alan Seltzer reviews these claims in detail in his companion paper.

If cities adopt any part of their inclusionary requirements as exactions or impact fees, they may want to follow MFA procedures to protect against a future challenge, even if not acknowledging that the fees are subject to the Act. A difficulty in complying completely with the MFA is the need to identify precisely the “public facilities” that the fee is to pay for. Affordable housing projects funded with impact or in lieu fees are typically proposed by private parties on an ad hoc basis, rather than – as in the case of other public facilities – being built by the public

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<sup>42</sup> See *San Remo* at 670-71.

<sup>43</sup> Government Code Section 66000 *et seq.*

entity pursuant to an adopted capital improvements plan. This difference may help convince a court that affordable housing is not a “public facility” and hence is not subject to the MFA (even if it is ultimately defined as an exaction). However, following the MFA procedures in *adopting* an ordinance may at least protect the adoption against a facial challenge (as was the case in Santa Monica).<sup>44</sup>

Takings and Price Control Issues. Clearly an impact fee and inclusionary requirement cannot be so confiscatory as to deprive an owner of “*all* economically beneficial use” of the property. The issue is whether, as price controls, they must also give owners a reasonable rate of return.

From a practical viewpoint, the requirement of the Department of Housing and Community Development (“HCD”) that cities demonstrate their inclusionary ordinances do not pose a “constraint” on housing has resulted in communities’ preparing economic studies to show that housing development remains feasible even after adoption of an inclusionary ordinance. Some of these studies have been based on a rate of return analysis. For instance, one study we reviewed looked at whether an inclusionary requirement would provide developers with a 12 percent profit on cost, based on data from the National Association of Homebuilders. Communities may want to include a rate of return analysis in their economic feasibility studies to protect against future claims based on the characterization of inclusionary requirements as price controls.

Relation to Density Bonus Law. If *Palmer* remains good law, rental affordable units can be required *only* if the project receives either money or “any other forms of assistance specified

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<sup>44</sup> Although a contrary argument may be made that, if the city follows MFA procedures, applicants may claim that the city has conceded the applicability of the MFA.

in [density bonus law].” The “forms of assistance” specified in the relevant code sections include density bonuses, “incentives and concessions” (almost any regulatory concession), waivers of development standards, and reduced parking requirements. Some communities now give incentives for inclusionary housing through mechanisms that are distinct from density bonus law. It may be prudent to specify that all forms of assistance granted to projects are being provided pursuant to state density bonus law, to ensure that all of these incentives can be recognized in an agreement requiring the provision of affordable rental housing.<sup>45</sup>

Some communities have adopted density bonus ordinances that provide bonuses and incentives only when the developer *voluntarily* agrees to construct affordable units. If affordable units are *required* by an inclusionary ordinance, the developer is not eligible for a density bonus. Practitioners should note that, pursuant to *Palmer*, because cities cannot require the provision of affordable rental housing, any affordable rental unit provided in a new development is, by definition, provided *voluntarily* and hence is entitled to state density bonuses and incentives.

Relation to Redevelopment Production Requirements. State law requires that 15 percent of housing produced in redevelopment areas be affordable (6 percent to very low income households, 9 percent to moderate-income households). As the Housing Set Aside money used for this purpose has disappeared into the giant State maw, more communities have been relying upon inclusionary ordinances to ensure that each project in the redevelopment area meets its production requirement (i.e., includes 15 percent affordable housing). Communities that lose the ability to obtain this affordable housing may have few opportunities to meet their production requirements.

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<sup>45</sup> However, at least one publication has opined that the “plain language” of the exception requires only that a *form* of assistance mentioned in density bonus law be provided, not that the incentive must actually be provided pursuant to density bonus law. See *Legal Issues*, *supra* note 28, at 27.

Some adopted redevelopment plans allow the redevelopment agency to adopt guidelines to ensure that the agency is meeting its affordable housing requirements. A question is whether such provisions could provide independent authority to reject a project that does not provide adequate affordable housing on site. Alternatively, a question is whether a nexus study would allow the city to charge a high enough fee to provide the required affordable housing elsewhere in the redevelopment area.

### **Conclusion**

The implications of *Palmer* for the creation of affordable housing in the State of California may be profound. If the case is not depublished or accepted for review, it would be prudent for communities with inclusionary ordinances to amend them to avoid a facial conflict with State rent control provisions. While some of the changes suggested here may mitigate the effect of adverse court rulings, *Palmer* will likely require changes in affordable housing policies and practices in the State if it is not modified by the California Supreme Court.

# After the Downturn: New Challenges and Opportunities for Inclusionary Housing

**By Robert Hickey**

February 2013

## SUMMARY

This paper examines how inclusionary housing policies fared during the nation's historic housing downturn, as well as the major issues and opportunities that confront inclusionary housing today, as the housing market begins to recover.

While most inclusionary policies survived the downturn, eight key challenges have come into greater focus over the past five years, affecting inclusionary policies in various parts of the country. These include – among others – new restrictions on applying inclusionary requirements to rental housing, a shift in development patterns toward “infill” settings where developments costs are often higher, and lingering difficulties selling affordable homes produced through inclusionary policies in a number of communities.

At the same time, new opportunities have emerged for communities seeking to establish or expand their inclusionary housing programs. In spite of the downturn, some jurisdictions have added or intensified their policies in areas experiencing significant upzoning and/or major new transit investments. In addition, the U.S. Department of Housing and Urban Development (HUD) has intensified scrutiny of local housing policies that impede fair housing choices, creating new openings for local conversations about the potential of inclusionary housing policies to affirmatively further fair housing. Finally, new difficulties have spawned new creativity,



Rick Jacobus

**A family stands in front of their inclusionary home under construction by the Housing Land Trust of Sonoma County in Petaluma (CA).**

creating opportunities for jurisdictions to learn from one another about new ways to strengthen policies and make them more workable for private developers.

This paper, the first in a series, focuses on key challenges while hinting at creative responses worth further study and experimentation.

# Introduction

Across the U.S., hundreds of communities are using inclusionary housing policies to create affordable homes in mixed-income settings. Inclusionary housing policies require or encourage developers to include a modest share of homes for low- or moderate-income households in otherwise market-rate developments. Most inclusionary policies are implemented through the zoning code, as mandatory requirements, accompanied by various forms of regulatory relief to help offset the costs of pricing units affordably. These policies are generally known as “inclusionary zoning” or “IZ.” Other policies are voluntary, relying instead on incentives such as density bonuses to produce affordable homes. In each form, inclusionary housing policies seek to create diverse neighborhoods and broaden the array of affordable housing options available to low- and moderate-income households.

Inclusionary housing policies are attractive to many local governments in both the U.S. and abroad because of their ability to harness the energy of the private market to create affordable homes while enabling economic integration and social inclusion. Though not a “panacea” for local affordability problems, as both opponents and supporters are quick to point out, inclusionary housing is distinguished by its ability to locate affordable homes in neighborhoods of opportunity where other state and federal housing programs often struggle to expand affordable housing choices for lower-income households. For example, a recent study by the RAND Corporation found that, “compared to other affordable housing programs, IZ programs provide recipients with greater access to low-poverty neighborhoods, which are often correlated with high-performing schools.”<sup>1</sup>

Additional advantages touted by supporters include the ability to produce affordable homes without the need for public subsidies, the ability to generate funding for affordable housing (through cash payments or land dedications made in lieu of including affordable units within new development), and a natural tendency to work best in hot housing markets, precisely where land for affordable homes is hardest to find, and home prices are rising most quickly.

Interest in inclusionary housing accelerated during the first half of the 2000s, as home prices rose rapidly in many communities.<sup>2</sup> Observers now estimate there are over 400 mandatory inclusionary policies nationwide,<sup>3</sup> spread across 17 states plus the District of Columbia.<sup>4</sup> Voluntary policies operate in several additional states.

But over the past five years, a lot has happened that affects inclusionary housing policies in the U.S.:

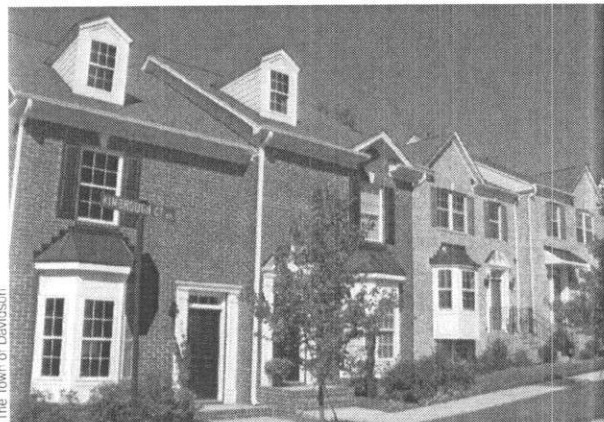
- **The nation's housing market experienced one of the most significant downturns in the past 120 years.** New construction ground to a halt even in many previously hot markets, and home prices dropped significantly in most places;
- **Local and state affordable housing resources dwindled,** as local revenue sources dried up and funding was cut for the federal HOME program – a block grant to state and local governments for affordable housing;
- **California's *Palmer* court decision in 2009** prompted most of the state's jurisdictions to cease applying inclusionary housing policies to rental developments, just as affordability pressures began to escalate in the rental market;<sup>5</sup>
- **The elimination of Redevelopment Agencies in California** led many jurisdictions in the state to stop enforcing inclusionary policies that were applied only to local redevelopment areas, while significantly decreasing funds for the staff that administer inclusionary housing programs in many municipalities;
- **Cities and high density suburbs grew at a faster rate than the nation's exurbs,**<sup>6</sup> as residential development occurred increasingly in infill locations;<sup>7</sup> and
- **HUD expanded its focus on affirmatively furthering fair housing,** with heightened scrutiny of local housing policies that impede housing choices for persons of color.

These new developments have changed the environment for inclusionary housing significantly. With the housing market finally beginning to recover, this is a good time to take stock of the nation's inclusionary housing policies and assess the new challenges, needs, and opportunities that confront inclusionary housing policies going forward.

This report begins by examining how well inclusionary housing policies have weathered the storm of the past five years. Drawing on an extensive literature review and 35 interviews with practitioners, experts, and local administrative staff, I outline eight major issues that jurisdictions and inclusionary housing policies face at the start of 2013.<sup>8</sup> I conclude with some thoughts about promising directions for addressing these challenges and crafting successful policies in the years ahead.

# Taking Stock

## Most Policies Remain Intact After the Housing Downturn



**A mix of market-rate and inclusionary townhomes in Davidson (NC).**

In 2006, the U.S. housing market entered one of its most severe downturns in the last 120 years. Housing production slowed dramatically in most corners of the country. The private development industry saw tremendous job losses. Many local and state governments experienced significant fiscal hardship, as property tax revenues fell and other revenues derived from real estate activity dried up.

Yet in spite of these market difficulties, most of the nation's inclusionary housing policies survived the downturn. Of the roughly 400 mandatory inclusionary policies that existed nationwide in 2007, my research has uncovered only a handful that have been discontinued over the past five years: two in Colorado (Longmont and Lafayette), one in Minnesota (St. Cloud), one in Montana (Bozeman), one in Wisconsin (Madison), one in Florida (the town of Davie), and two in Idaho struck down by legal challenge (McCall and Sun Valley).<sup>9</sup> Since there is no comprehensive up-to-date database of inclusionary housing policies, there may well be other communities that have discontinued their policies, but the small number of abandoned policies are still the exception that proves the rule – most policies remain in place.

In most of the eight cases above, local officials struggled with a weaker housing market than typically exists in jurisdictions with inclusionary policies.<sup>10</sup> Also, in most of these jurisdictions, home prices had declined to such low levels jurisdiction-wide that inclusionary units were being priced at levels comparable to or higher than nearby market-rate homes. Developers were unable to sell their inclusionary units, especially given that these homes came with resale restrictions that were

not shared by other homes on the market.<sup>11</sup> Finally, many of these policies were adopted very recently, as a reaction to the housing bubble, leaving them vulnerable to challenge when the bubble burst.<sup>12</sup>

In contrast, in the three states that account for the vast majority of the nation's inclusionary policies – California, New Jersey, and Massachusetts<sup>13</sup> – it does not appear that any policies were eliminated during the market downturn.

Similarly, relatively few local governments appear to have reduced their inclusionary affordability requirements between 2007 and 2012. My research has uncovered only a handful of examples:

- In November 2012, San Franciscans passed Measure C, which reduced the city's on-site affordability requirement from 15 to 12 percent in most areas of the city. The reduction was part of a larger, political compromise that will create a citywide Housing Trust Fund with ongoing, annual allotments of at least \$20 million from the city's General Fund.<sup>14</sup>
- Santa Fe temporarily reduced its inclusionary homeownership requirement from 30 percent to 20 percent. The change is slated to expire, however, in 2014.<sup>15</sup>
- Several jurisdictions in the San Diego region lowered their in-lieu fee requirements, including the city of Oceanside, which had originally planned to terminate its policy but ultimately lowered its fee instead.<sup>16</sup>

### Defining Inclusionary Housing

The term "inclusionary housing" is used here to describe policies that either *require* developers to offer lower-priced units in otherwise market-rate developments, or *encourage* their inclusion through incentives. The differences between mandatory and voluntary policies can be thin at times, with some "voluntary" policies effectively acting as requirements, and some "mandatory" policies applying only to special districts or certain development types, essentially giving developers a choice of whether to opt in. Because of the substantial gray area between voluntary and mandatory policies, and because they strive to achieve the same general outcomes, this report uses the term "inclusionary housing" to encompass both approaches.

California, New Jersey, and Massachusetts each provide a strong policy backstop at the state level for local inclusionary policies that help protect these policies from being overturned.

### **Why Weren't More Policies Weakened or Eliminated?**

Given the housing market slowdown, one might have expected private developers to convince more local officials to rescind local inclusionary housing policies, or at least to suspend requirements. Why didn't this happen? To the extent we can answer this, it may provide important insights into how inclusionary housing policies can be preserved and strengthened going forward.

The most straightforward explanation for inclusionary housing's resilience during the downturn is that most policies tend to be based in relatively strong housing markets. Certainly a strong economy has buoyed inclusionary policies in places like Montgomery County (MD), where private development never ceased during the economic downturn. Developers there have produced more than 700 inclusionary units since 2008 – roughly half rental, and half ownership.<sup>17</sup>

Inclusionary housing also tends to be located in places with strong, local constituencies. Their support fortified policies in even weak markets over the past five years. For example, the Florida jurisdictions of Palm Beach County and Tallahassee saw median home prices cut in half during the downturn and new production slow to a trickle. Nonetheless both jurisdictions left their policies unchanged after local advocates mustered a strong counter-weight to efforts to overturn them.<sup>18</sup> A new policy in Baltimore survived a similar challenge in 2011.<sup>19</sup>

The flexibility of many inclusionary housing policies may have provided further insulation from challenges during the housing downturn. Many policies allow alternatives to the on-site construction of affordable units in certain situations. Options include payment of an "in-lieu" fee, building affordable units off-site, or dedicating land. Some policies also allow developers to waive out of requirements altogether in cases of severe financial hardship. Jurisdictions can also adjust these options as market conditions change, as in the case of Oceanside discussed above. Arguably, this flexibility, especially when combined with cost-offsets (such as density bonuses and relaxed zoning standards), has helped to reduce the grounds for concern with ordinances, helping them endure through the housing downturn.

Finally, California, New Jersey, and Massachusetts each provide a strong policy backstop at the state level for local inclusionary policies that help protect these policies from being overturned. Eliminating inclusionary requirements in any of these states simply means that a given jurisdiction will have to come up with other tools for generating housing for below-median-income households – such as raising local funds to subsidize affordable units – in order to stay compliant with state housing laws. Oftentimes these alternatives are more politically difficult than adopting an inclusionary housing policy.

The recent experience in the city of Folsom (CA) is illustrative. California Housing Element law requires that jurisdictions create realistic opportunities for meeting regionally determined affordable housing targets. Historically, inclusionary housing policies have been a popular tool for complying with this law.<sup>20</sup>

In 2011, Folsom's City Council voted to end its inclusionary housing policy. But in June 2012, the Superior Court of Sacramento County ruled that Folsom could not drop its inclusionary housing ordinance (IHO) without adopting a new housing strategy to replace it. In the decision, the judge stated:

The Court is persuaded that the city's action to sunset the IHO is inconsistent with the city's housing element because it (1) discontinued a program ostensibly responsible for nearly half (405 units) of the city's quantified objective for affordable housing, without identifying any replacement program; and (2) interfered with the Housing Element's goals to promote the development of affordable housing. Therefore, the City's Sunset Ordinance should be invalidated.<sup>21</sup>

To date, Folsom's inclusionary policy remains on the books.

It would be overly simplistic to solely credit state housing law for the perpetuation of so many policies in California, given that many policies were created as a response to real, local affordability concerns.<sup>22</sup> Furthermore, the major, recent drop in state public subsidy for affordable housing has made inclusionary housing all the more appealing for some California communities. But arguably state housing law has made it a bit more difficult to eliminate inclusionary policies without legal consequence.

Similarly, the perpetuation of inclusionary housing policies in New Jersey reflects the strength of New Jersey's Fair Housing Act. This landmark law recognized inclusionary set asides, coupled with higher-density rezoning, as essential steps for creating "realistic opportunities" for the development of a municipality's fair share of affordable housing. Accordingly, these mechanisms have become important<sup>23</sup> means by which a municipality can gain certification from the New Jersey Council on Affordable Housing for its local housing plan.<sup>24</sup> This certification, in turn, grants a local government valuable immunity from "builder's remedy" lawsuits filed by developers.<sup>25</sup>

Inclusionary housing also interfaces in important ways with state housing policy in Massachusetts. Under the state's Comprehensive Permit Law (often referred to as 40B), municipalities can obtain temporary "safe harbor" from appeals by developers to override local zoning if the jurisdiction can get its Housing Production Plan certified by the state Department of Housing and Community Development (DHCD) and make regular progress toward achieving a 10 percent affordable housing stock.<sup>26</sup> Inclusionary housing has provided a means to work toward this 10 percent goal, though the Massachusetts DHCD has not been as explicit in its support for mandatory inclusionary housing policies as New Jersey or California.<sup>27</sup>

Colorado provides an interesting contrast to these three states. There is no similar policy at the state level that creates an incentive for local jurisdictions to adopt an inclusionary housing policy. This may have left local policies more vulnerable to elimination or change in recent years. Indeed, policies in the cities of Longmont and Lafayette were among the handful of ordinances

nationwide that were overturned during the past five years. And while the city of Denver's policy is still on the books, it faces serious challenges from developers and local elected officials concerned about problems that arose during the downturn, such as foreclosures of some poorly monitored inclusionary units and resale difficulties in certain neighborhoods.<sup>28</sup> Without a strong state backstop that requires local efforts to provide affordable housing, the outcome of these discussions is uncertain.

### **Inclusionary Policies Survived, but Most Inclusionary Production Stalled During the Market Downturn**

While most policies survived the housing downturn nationwide, few saw much inclusionary housing production over the past five years. This exposes one of the key weaknesses of inclusionary housing as an affordable housing production strategy – its dependence on market-rate development. When private housing development comes to a halt, so does inclusionary production.

We can find exceptions in the strongest housing markets where market-rate development continued during the recession, albeit at a slower pace. Policies in the Washington, DC, metropolitan area and New York City together produced more than 1,200 inclusionary units during the national housing downturn.<sup>29</sup> But the resumption of inclusionary housing production has been more tentative in moderately strong markets, and has been largely confined to municipalities that apply their policy to rental development, which excludes many California and Colorado communities, as discussed in greater detail below.



**Battle Road Farm is a 120-unit, mixed-income condominium development in Lincoln (MA). Forty percent of the homes are deed-restricted at below-market prices in perpetuity. The town assisted by providing land at reduced cost.**

Business and Professional People for the Public Interest

# Key Challenges Affecting Policies Going Forward

As the housing market emerges from the downturn of the past five years, inclusionary housing policies face a new set of challenges – some, but not all, related to the downturn. Below I identify eight pressing issues that confront jurisdictions at the start of 2013. With one exception – the loss of redevelopment in California – each of these issues echoes in various parts of the U.S.

## 1. The Growing Difficulty of Applying Inclusionary Housing to Rental Properties

The most significant change to the nation's inclusionary housing landscape over the past five years was triggered not by the collapsing market or resulting pressure from private developers, but by a California legal decision rendered in 2009.

In *Palmer/Sixth Street Properties, L.P. vs. the City of Los Angeles*, a California appellate court found that an inclusionary requirement requiring affordable rental units in Los Angeles was inconsistent with state law prohibiting rent control.<sup>30</sup> Since this decision, most California jurisdictions have ceased applying their inclusionary policy to market-rate rental developments to stay clear of legal trouble. This is significant because California is home to almost half of the nation's inclusionary policies<sup>31</sup> and because most new development in California is presently being built as multifamily rentals. Also, the inability to generate inclusionary rental units comes at a time when many California towns and cities are seeing rent levels nearing all-time highs, and fiscally strapped state and local governments have cut or fully spent public funds that subsidize affordable rental housing.

The *Palmer* decision, combined with a slow recovery in the new for-sale home market, has elevated the nationwide importance of finding new ways to address legal impediments to rental inclusionary housing, as the issue affects not just California but other states such as Colorado, Wisconsin, and North Carolina.

Jurisdictions in California have generally responded in one of three ways to prohibitions on inclusionary rental units:

- **No longer applying inclusionary requirements to rental developments.** This appears to be the case for a majority of California jurisdictions with existing inclusionary policies.
- **Applying rental requirements only to developers that request some form of "assistance," such as zoning modifications or upzonings.** In this case, the municipality conditions its assistance on voluntary compliance with inclusionary rental requirements. This approach is less impactful in places that have recently upzoned desirable development areas – since developers no longer need special approval for higher density – and in places that have made attractive zoning terms available "by right" – for example in the city of Emeryville. No rental housing developers have yet sought assistance in Emeryville because of its already favorable zoning terms, thereby evading inclusionary requirements altogether (and virtually all of the city's development proposals currently are for rental housing).<sup>32</sup>
- **Shifting to a fee-based policy (sometimes with the option to waive out of the fee by providing units).** Rather than require inclusionary units to be built as part of new market-rate development, several jurisdictions are instead assessing an affordable housing fee on new rental development. Some jurisdictions offer developers the option to produce units on site as an alternative to paying the fee – in essence, the opposite of a traditional inclusionary zoning policy with the option to pay a fee in lieu of including affordable units. In San Francisco, a relatively high fee has made voluntary, on-site compliance relatively attractive for many developers as an alternative to paying the fee. San Diego takes a similar approach by exempting developers from the fee if they provide 10 percent affordable units on site. In Mountain View, the fee is only applicable to rental development.

As jurisdictions continue to experiment with workarounds to the *Palmer* decision, finding an effective solution has become all the more urgent.

The most significant change to the nation's inclusionary housing landscape over the past five years was triggered not by the collapsing market or resulting pressure from private developers, but by a California legal decision rendered in 2009.

## 2. The Elimination of Redevelopment in California Undermined Many Inclusionary Housing Policies

In late 2011, California governor Jerry Brown set in motion the elimination of redevelopment agencies statewide. With their disappearance came not just the loss of approximately \$1 billion in local funds supporting affordable housing, but also the loss of inclusionary requirements that were tied specifically to redevelopment areas.<sup>33</sup> This has had a major (though less documented) impact on the inclusionary housing landscape in California.

Under state law, redevelopment agencies were required to ensure that 15 percent of all new homes in redevelopment areas were affordable to low- and moderate-income households. While jurisdictions were given a choice of how to achieve this threshold, many mandated inclusionary housing in their redevelopment areas and/or required affordability from private developments seeking redevelopment assistance.

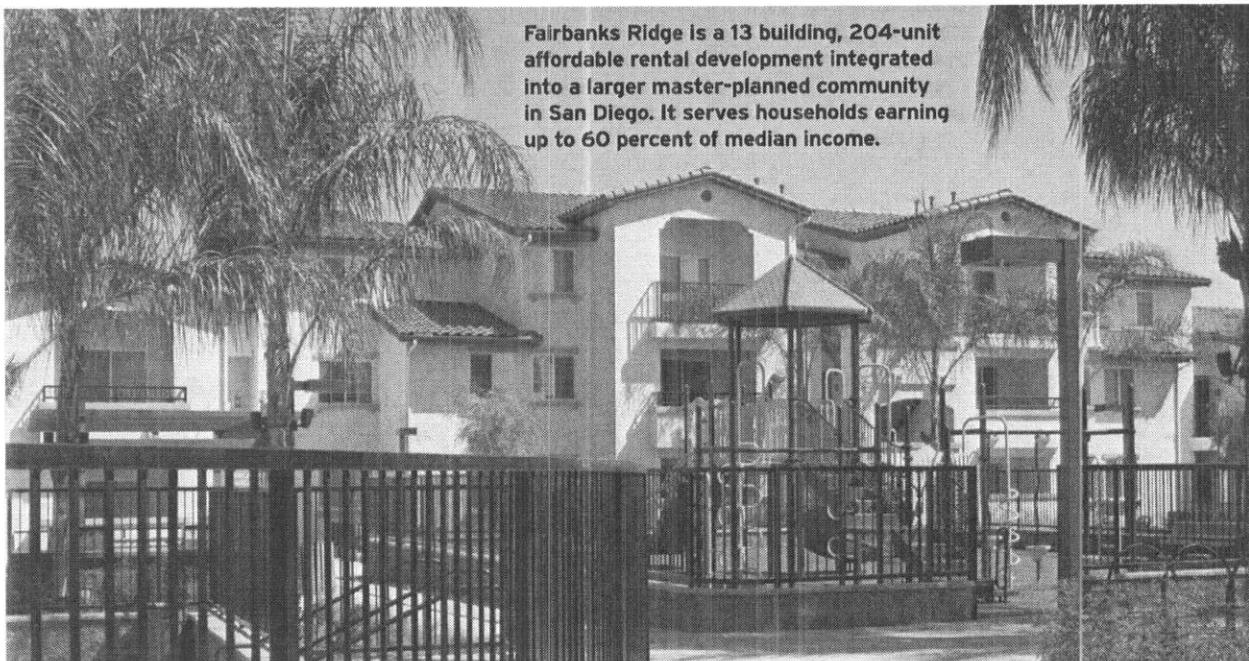
State law is unclear on whether the 15-percent, area-wide affordability requirements remain in effect.<sup>34</sup> As a result, many jurisdictions are backing away from the inclusionary requirements they used to meet this standard, according to advocates.<sup>35</sup> Furthermore, the State Department of Finance has taken the position that these requirements no longer apply. It is also up to the successor agencies that are winding down ongoing debt repayment and other contractual obligations for the redevelopment agencies to decide whether to enforce

affordability covenants on existing below-market-rate homes within redevelopment areas.<sup>36</sup>

For approximately 289 California municipalities, redevelopment-area-wide affordability requirements were the only policies tying affordable homes to new market-rate development within the local jurisdiction.<sup>37</sup> Their loss therefore leaves a big hole in the state's patchwork of inclusive housing policies, especially in conservative municipalities.

Another consequence of the elimination of redevelopment agencies has been reduced funding for the administration of citywide inclusionary policies. This is because funds raised by redevelopment agencies through tax increment financing and other mechanisms provided at least partial support to many inclusionary housing administrative staff.<sup>38</sup> The city of Fremont, for example, has had to lay off its entire housing staff, severely impacting the management of its inclusionary housing policy. In other cities, staff formerly responsible for managing just the local inclusionary program have now had to take on successor agency responsibilities as well, because these agencies are not allowed to allocate tax increment funds for their own administration.<sup>39</sup>

Reduced staffing for inclusionary programs decreases not just the ability of a town or city to work closely with developers to help them meet inclusionary requirements, but also staff's ability to monitor inclusionary properties over time to ensure that they continue to be offered at affordable prices. In the past, such limited oversight has led to jurisdictions losing a significant portion of their inclusionary housing stock, on account of illegal sales or even foreclosures.<sup>40</sup>



**Fairbanks Ridge is a 13 building, 204-unit affordable rental development integrated into a larger master-planned community in San Diego. It serves households earning up to 60 percent of median income.**

Lynn Schmidt, Courtesy of Chelsea Investment Corporation

### 3. New Inclusionary Housing Policies Have Become Harder to Pass

While most inclusionary policies remain on the books, the market decline has made it more difficult for advocates promoting inclusionary housing to pass new policies – particularly in areas that are not experiencing major upzonings or new transit investments. (These settings may actually make it easier to pass new policies, as discussed later under “New Opportunities.”)

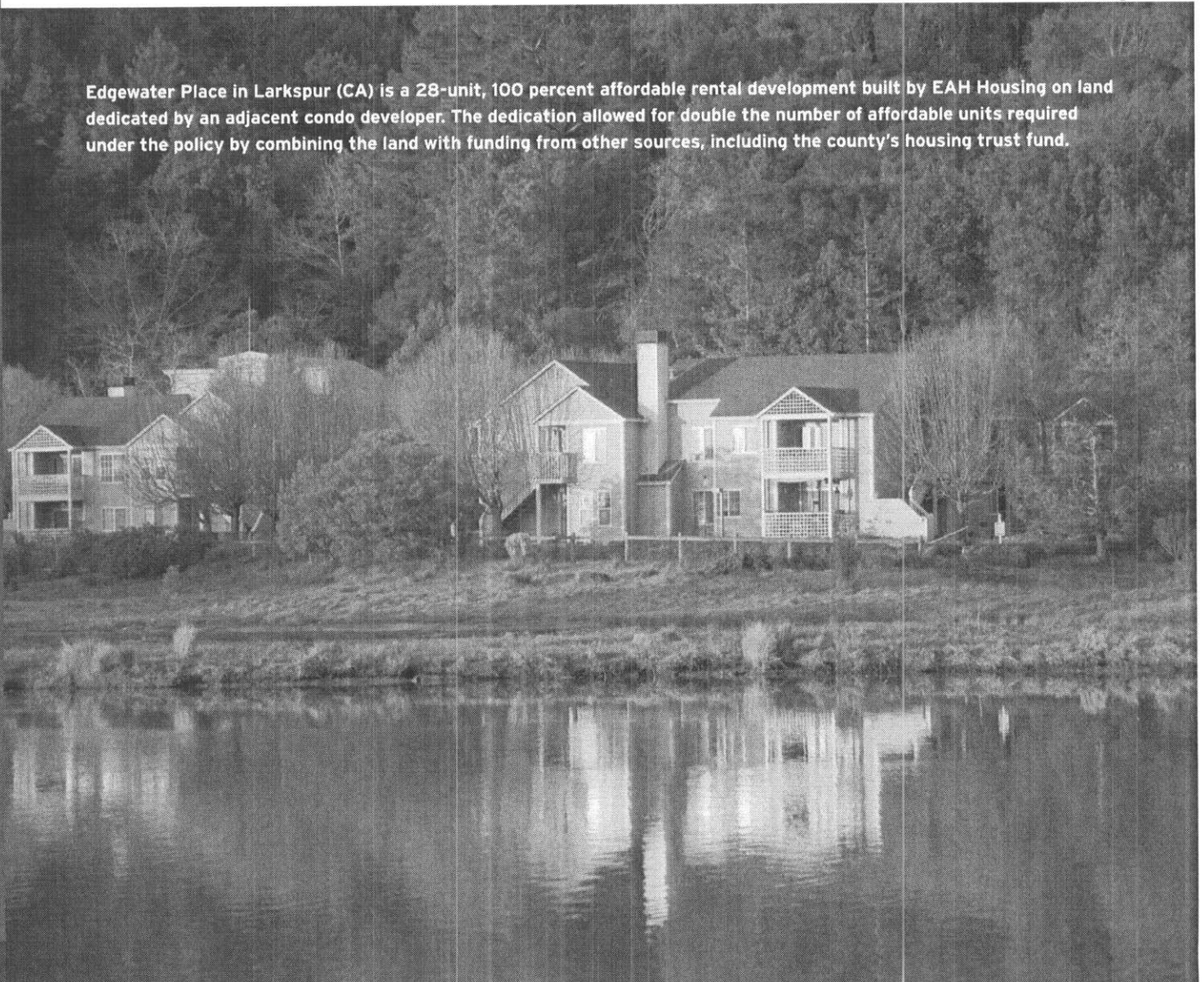
Concerns about the strength of the housing recovery also appear to have undermined efforts to build momentum in California for a legislative “fix” to the *Palmer* decision since it was issued in 2009. A state senate bill designed to override the *Palmer* decision (SB 184) failed to make it through the Senate this past year. The California Building Industry Association (CBIA), the

California Apartment Association, and other opponents were able to convince even moderate Democrats to vote against it.<sup>41</sup>

Challenges to new inclusionary policies also have a legal dimension in California. As discussed above, the *Palmer* decision upended efforts to pass a new inclusionary policy in Los Angeles. Furthermore, a second recent decision – *Building Industry Association of Central California vs. City of Patterson* (2009) – has created some confusion about what kind of study is necessary to justify fee-centered or other inclusionary requirements, and has given litigants a new angle for challenging new or recently amended policies.<sup>42</sup> For example, the CBIA successfully sued the city of San Jose in 2012, preventing it from rolling out a new inclusionary policy set to begin in 2013. The lower court’s decision has been appealed, but the outcome is uncertain.<sup>43</sup>

EAH Housing

Edgewater Place in Larkspur (CA) is a 28-unit, 100 percent affordable rental development built by EAH Housing on land dedicated by an adjacent condo developer. The dedication allowed for double the number of affordable units required under the policy by combining the land with funding from other sources, including the county’s housing trust fund.



At issue are the higher per-unit costs of many infill locations and the different set of cost-offsets that may be necessary to keep policies workable for developers in these new environments.

#### **4. As Development Continues to Shift Toward Infill Settings, Policies Written for Greenfield Developments May Need Adjusting**

Many of the nation's inclusionary housing policies were written for undeveloped, "greenfield" settings in affluent suburbs. These policies were conceived for communities in which land was relatively plentiful, and low densities were feasible. While suburbs remain the predominant location for new housing construction, development patterns are shifting toward compact, transit-served neighborhoods closer to the regional core – a trend found in nearly three quarters of the nation's large metropolitan areas, according to recent research.<sup>44</sup> To the extent this shift continues, older policies may need adjusting to remain workable for developers and newly developed policies may need to be adapted to the realities of infill development.

At issue are the higher per-unit costs<sup>45</sup> of many infill locations (see below), and the different set of cost-offsets that may be necessary to keep policies workable for developers in these new environments.

There are several reasons why it can be more challenging for private developers to include affordable units in denser, infill settings than in lower density suburbs:

- **Land prices tend to be higher in infill areas.**
- **Structured parking is usually needed to accommodate cars in infill areas**, at an average cost of \$15,000-\$20,000 per space, according to one study. Underground parking can cost \$25,000-\$35,000 per space.<sup>46</sup>
- **Once buildings reach five-to-six residential stories, they are required to add elevators and shift from wood-frame to steel/concrete construction**, increasing per-unit costs significantly. At heights of over 100 feet, buildings also take on additional "life/safety" costs for features such as sophisticated fire alarm systems, pressurized exit stairs, and other fire safety provisions.<sup>47</sup>
- **Inclusionary units are more likely to be built in the same building as market-rate units** (rather than in separate buildings elsewhere on site), making it more difficult to build the inclusionary units at a lower cost than the market-rate units.<sup>48</sup>
- **Developers often take on more risk with high-rise developments** because they cannot be built incrementally in response to market demand, unlike "horizontal" developments in lower-density settings.<sup>49</sup>

#### ***Density Bonuses Are More Valuable in Some Settings than Others***

Because of the higher cost of development associated with taller buildings that require steel or concrete framing, elevators, or various other safety features, the primary cost-offset favored by traditional inclusionary policies – the density bonus – can sometimes trigger these more expensive construction requirements in an infill setting, complicating efforts to use density as the offset for inclusionary policies.

Where density limits are low, such as in greenfield settings, a density bonus can enable a developer to produce more housing units without having to acquire additional land. This can be very lucrative and help offset losses incurred by offering inclusionary units at below-market prices.

But when prevailing densities already allow for four-or-more stories, accessing density bonuses may necessitate moving into the high-rise portion of the cost curve where per-unit costs become more expensive.

In New York City, density bonuses have had mixed appeal for developers in certain neighborhoods for this very reason. In the city's highest density areas – where developers can already build well over six stories – and in areas where former industrial/commercial sites are being converted to residential uses, New York City has had nearly 100 percent participation in the city's voluntary inclusionary program, which trades higher density for affordability. But in neighborhoods of intermediate density, such as parts of Brooklyn, there has been much lower participation because accessing density bonuses would require higher, per-unit construction costs, but height limits impede tall enough construction to offset these higher costs with significantly more revenue-generating units.<sup>50</sup>

To foster mixed-income developments in infill areas of intermediate density – where a density bonus might trigger higher-cost construction requirements

– it is worth taking a closer look at other ways that jurisdictions may be able to offset higher per-unit development costs, in addition to the venerable density bonus. Promising ideas include:

- **streamlining the entitlement process to reduce risks** (for example, the risk that a hoped-for zoning variance may not be granted);
- **relaxing lot coverage, public space, and parking requirements** in these settings;
- **facilitating off-site construction of inclusionary units** within a mile or less of the market-rate development;
- **allowing slightly higher rent payments and/or higher income targeting for inclusionary units** in these settings;
- **reducing the inclusionary requirements for tall buildings;** and
- **providing property tax abatement and other financial assistance** for these developments.

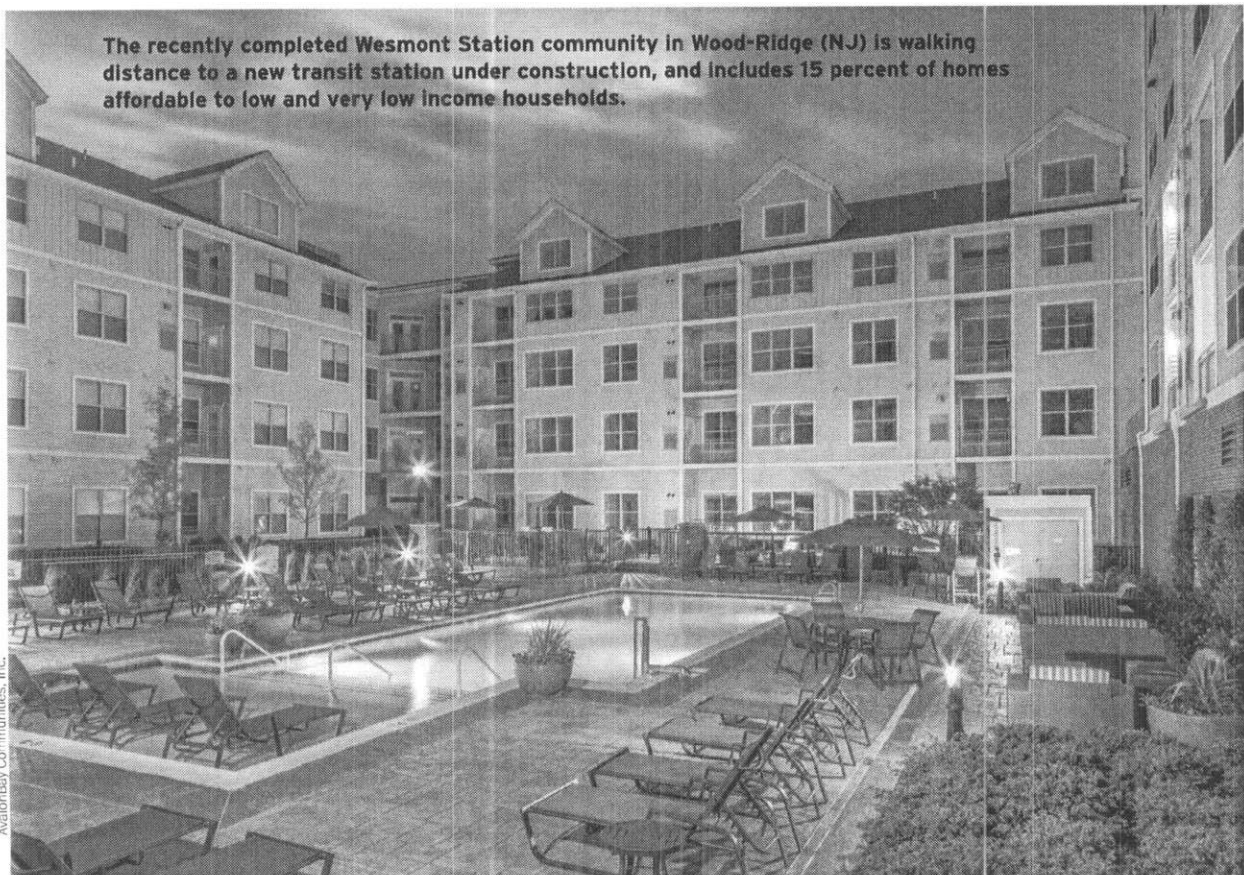
The applicability of each offset will certainly vary from place to place, as high market prices and tall height limits in some communities may allow developers to absorb higher per-unit costs more easily than in other communities.

## 5. Rising Homeownership Association and Condominium Fees

A related challenge to the higher costs of infill development is the rising cost of homeownership association (HOA) fees and special assessments in multifamily buildings.

A growing number of high-amenity, luxury developments are being built in urban settings. Multiple jurisdictions have had problems with HOA fees in these and other properties rising beyond what owners of inclusionary units can afford. Often the challenge is not so much that fees are prohibitively high at the initial point of sale, since fees are often part of the overall price calculation for inclusionary for-sale units, and accordingly must be affordable for targeted income brackets. The bigger challenge is that HOA and condo associations will increase fees and assessments once the developer is out of the picture. Inclusionary owners get outvoted and find themselves shouldering substantial fees that can sometimes rival mortgage payments.

Rising fees and special assessments undercut the affordability of inclusionary units for both existing owners and future homebuyers. Jurisdictions struggle to prevent or even just stay apprised of these cost increases. And for jurisdictions committed to maintaining the affordability of their inclusionary housing stock – ownership as well as rental – the cost of offsetting higher fees can be exorbitant, compromising a municipality's ability to promote affordability elsewhere in its jurisdiction.<sup>51</sup>



Mariposa Apartments in Carlsbad (CA) were built to fulfill inclusionary obligations as part of the larger Calavera Hills Planned Community. They are home to 105 households earning between 20 and 60 percent of area median income, and were built with additional assistance from tax exempt bonds and 4 percent low-income housing tax credits.



Lynn Schmidt, Courtesy of Chelsea Investment Corporation

## 6. Many Policies Will Need to Be More Creative to Serve Very Low- and Extremely Low-Income Households

The *Palmer* decision's recent prohibition of rental inclusionary requirements will make it harder to reach very low-income households in California earning 50 percent or less of the area median income. Generally it has only been the rental units of inclusionary housing policies that have served very low-income households. Ownership inclusionary units are rarely priced for households earning this little. A recent California survey, for example, found that only 11 percent of for-sale units were available to households with incomes at or below 50 percent of area median income. A majority were priced for households earning between 81 and 120 percent of the median.<sup>52</sup>

Many policies allow market-rate developers to meet their inclusionary requirements by dedicating funds or land to affordable housing developers to produce the required affordable units either on-site or nearby. With the help of additional public subsidies, affordable housing developers can build on these contributions to provide even deeper levels of affordability than originally required by the ordinance. These partnerships are relatively common in states like California, where they were responsible for nearly one-third of inclusionary homes between 1999 and 2006 and 68 percent of inclusionary homes for extremely low income households (a total of 611 units).<sup>53</sup>

However, many local and state governments have made significant cuts to affordable housing funding in recent years, and the federal government has cut funding for the federal HOME program substantially.<sup>54</sup> This loss of funding may impede the ability of mission-driven affordable housing developers to leverage inclusionary requirements for deeper affordability going forward.

Given this loss of funding, along with new restrictions on rental inclusionary housing, local governments may need to adopt new approaches to ensure that very low-income and extremely low-income households are included in newly developing communities. Potentially promising ideas include:

- **Providing public land at discounted cost** to support inclusionary partnerships that serve very low- and extremely low-income households;
- **Offering first-right-of-refusal for purchasing inclusionary for-sale homes to housing authorities or nonprofits** that can use public housing or Section 8 voucher subsidies to manage the units as deeply affordable rentals;<sup>55</sup>
- **Lowering the required affordability set-aside when developers meet deeper income targeting standards;** and
- **Conditioning particularly valuable cost offsets on providing deeper levels of affordability.**

## 7. It May Get Harder to Support Inclusion Through In-Lieu Fees

Most communities with inclusionary housing policies allow developers the option of satisfying their inclusionary requirements by paying an “in-lieu fee,” rather than constructing new affordable homes. Often, fee revenue is deposited in a housing trust fund and is used to facilitate construction of units elsewhere for low- and moderate-income households, or to achieve other affordable housing goals.

Often, the in-lieu fee is set low enough that developers prefer to pay the fee rather than produce the inclusionary units themselves. Various problems can follow.

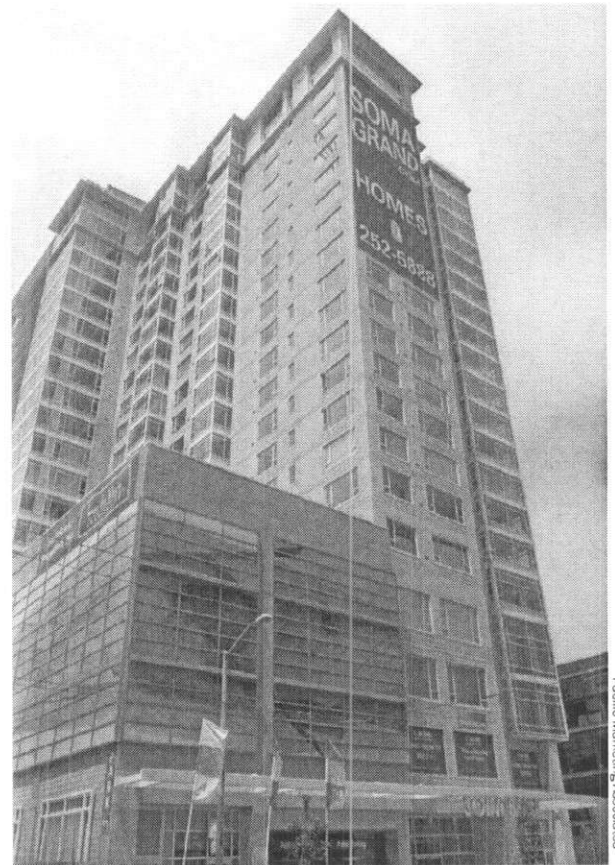
The primary issue with an overreliance on in-lieu fees is that it can work against the goal of creating inclusive communities, particularly if fees are used to support affordable housing outside the area where new market-rate development is occurring.

The challenge of using in-lieu fees to further the goals of inclusivity is compounded in infill settings, where new development is increasingly focused. Infill areas often have a limited number of available sites at which a separate, affordable housing developer could use lieu-fee revenues to produce affordable homes.<sup>56</sup> And when sites are available, they are less likely to be priced affordably, given heightened competition from other developers.

A second challenge is that in-lieu fees are sometimes set too low to produce an equal number of affordable units elsewhere in the community – regardless of the setting.<sup>57</sup>

A third issue is that some communities lack local, affordable housing developers with the capacity to use fee revenues to produce new affordable homes. As a result, it is not uncommon for fee revenues to be used for downpayment assistance or other forms of housing support that are less geographically targeted, less directed toward lower-income households, and often accompanied by shorter affordability terms than inclusionary housing programs.

When sites are hard to find, fees are set too low, local capacity is constrained, or political support is lagging, inclusionary fee revenues can linger unspent for years. This has been a particular problem in New Jersey, for example. Since 1990, the state’s municipalities have collected more than \$442 million in fees-in-lieu, but only 15 percent of these funds have been spent on new affordable housing development. More than a quarter of municipalities collected fees but never expended a single dollar. A majority of the remaining jurisdictions have spent their fee revenues, but not on affordable housing construction.<sup>58</sup>



**SOMA Grand was built in 2007 with 246 luxury condominiums. Located in San Francisco, it includes 29 below-market-rate units sold to households earning at or below median income.**

This is not to say that fee options are inherently unhelpful. To the contrary, in-lieu fee revenues can help jurisdictions address diverse housing needs that would otherwise go unmet through inclusionary housing. By working in partnership with affordable housing developers, in-lieu revenues can be combined with other public funds to support larger-unit developments for families, service-enriched housing for people with special needs, or homes for extremely low-income households – all of which are rare and challenging in mixed-income developments.<sup>59</sup> And fee revenues can be used to create affordable rental units in jurisdictions where these types of homes are not being produced by inclusionary housing – for example in states like California and Colorado, where it is now illegal to require developers to price-control rentals directly. Fees used to support off-site affordable rental housing furthermore leverage the expertise that affordable housing developers have in managing affordable rentals.<sup>60</sup>

The challenge in the years ahead will be to find ways to ensure that in-lieu revenues are used to meet a broad range of housing needs while still supporting mixed-income communities, rather than creating a deeper pattern of segregated affordable housing.

## 8. It Is Still Difficult to Sell Inclusionary Ownership Units in Some Places

During the downturn, developers and homeowners struggled to sell (or re-sell) inclusionary homes in many communities, leading to pressure on local governments to ease policies and resale restrictions. As discussed earlier, this was the primary reason that a handful of municipalities discontinued their policies during the housing downturn. This issue has also been a challenge in jurisdictions that still have inclusionary policies.<sup>61</sup> The reasons for these difficulties vary, however.

One of the chief reasons that many “affordable” units produced through inclusionary housing policies are failing to sell is that market-rate home prices in many neighborhoods have dropped to levels comparable to inclusionary prices. Owners struggle to sell inclusionary units that are even slightly lower in price than comparable market-rate homes, because resale restrictions that cap future equity gains make the inclusionary units less attractive.<sup>62</sup> As a result, some inclusionary homeowners and developers have had to accept losses to sell their homes, or even face foreclosure – similar to other homeowners and developers whose homes are not restricted.

It remains to be seen whether this problem is a one-time issue related to the historic and mostly unprecedented housing market crash. If so, market-rate competition may be less of a problem going forward as the market recovers. This problem also may be the product of unrealistic expectations as much as a problem with underlying policies. After all, homeowners of all incomes lost money and experienced difficulty finding buyers during the housing crash and foreclosure crisis. While the below-market purchase prices of inclusionary units provide some protection from modest housing price downturns, there are still risks involved in purchasing these units and one can argue that the purchasers of affordable homes have experienced significantly fewer problems than purchasers of market-rate homes.

There are also some challenges, however, that affect the sales of inclusionary homes more than market-rate homes:

- **Tightened mortgage standards.** Multiple jurisdictions report difficulty in finding lower-income buyers that can qualify for mortgage financing. Following the onset of the housing downturn, banks now require much stronger credit and larger downpayments than in the past, leading many applicants to fall short of qualifying for a loan. This has been reported as a major problem even in strong markets, such as San Francisco, Montgomery County (MD), and Fairfax County (VA). Sellers therefore

find themselves facing a much smaller buyer pool for inclusionary units than in previous years.

- **FHA unwillingness to insure loans for homes whose price restrictions will survive foreclosure.**

This issue has become prominent in the past five years, and has had a marked impact on the initial sale of inclusionary homes, especially in places with relatively new programs, such as Washington, DC, and localities in Washington State. Because other sources of financing have dried up in many locations, few lending products may be available for applicants in these areas. The concern for FHA (and others such as Freddie Mac) is that resale restrictions on inclusionary units may impede the resale of homes should they be foreclosed upon, preventing the lender from fully recouping its loan. Some jurisdictions seek to get around this problem by allowing affordability restrictions to expire upon foreclosure, thereby obtaining an FHA waiver, while taking proactive steps to intercept units before foreclosure occurs (or by working to prevent foreclosure through better monitoring and homebuyer education). However, some jurisdictions find it challenging to get lenders to notify inclusionary administrative staff of imminent defaults, and not all jurisdictions have the resources to acquire units that have gone into default.<sup>63</sup>

- **Restrictions on renting out ownership inclusionary homes.** Some jurisdictions prohibit inclusionary homeowners or developers from easing their financial situation by renting out their homes.

Effectively addressing the challenge of selling inclusionary units requires clarifying what factors most impact salability and working to address these problems. To rectify the issue of competition from market-rate units, a possible solution would be to require a lower initial pricing of inclusionary ownership units by future developers, while at the same reducing the set-aside requirement. But this does not address – and may in fact compound – the problem of a limited pool of qualified applicants. To broaden the pool of eligible buyers, it may also be necessary in some places to raise income restrictions for prospective buyers (while keeping prices still affordable for lower-income households), as Montgomery County does for developers who are unable to find qualified buyers within 90 days.<sup>64</sup> Alternatively a jurisdiction may wish to consider changing its inclusionary requirements to allow developers or owners to rent out the homes in the event they try but are unable to sell them after a reasonable period of time. Jurisdictions also may wish to allow developers to convert ownership units to rentals on a more permanent basis in the event a sale at the target price is infeasible.

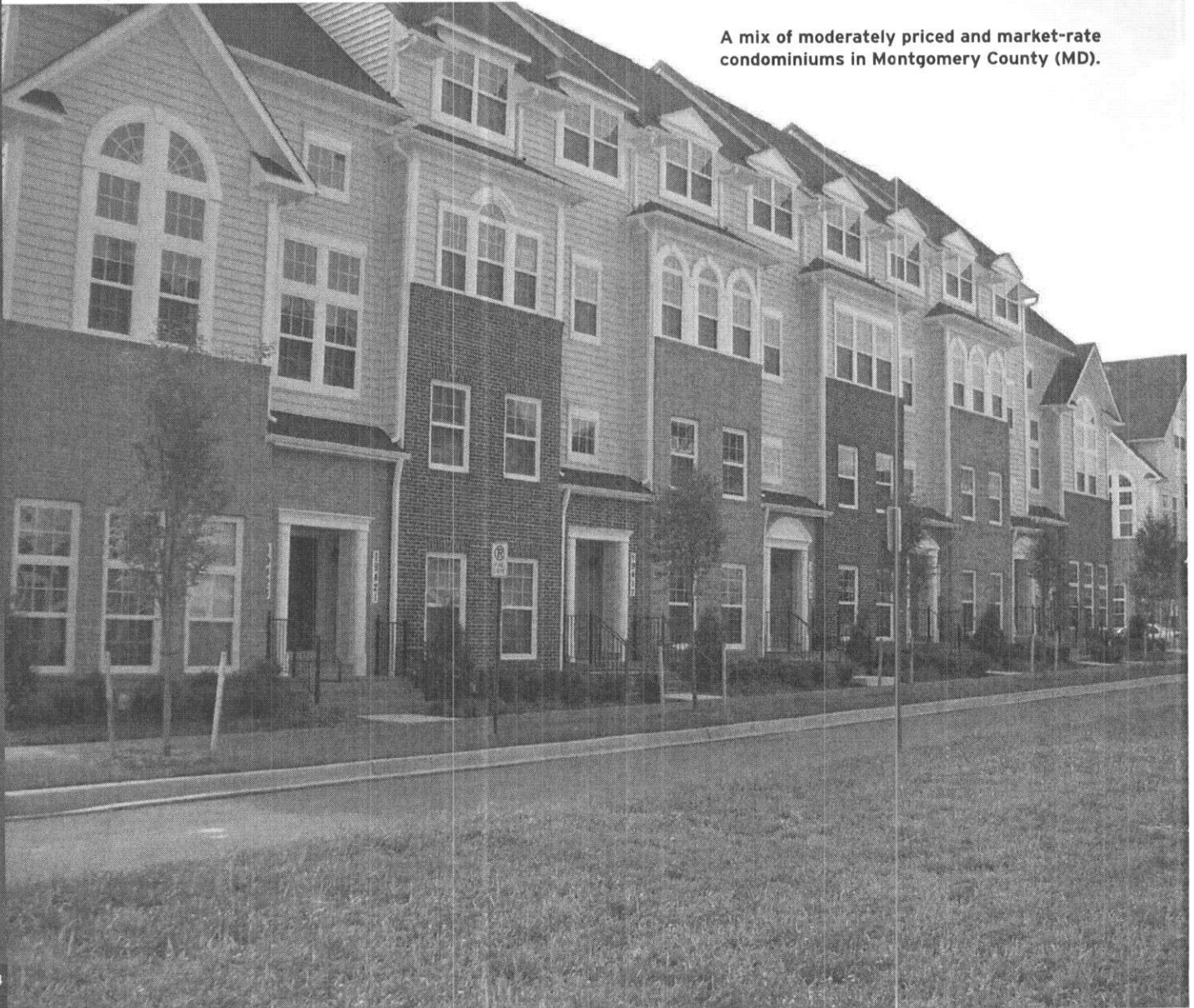
The underlying challenge for the field is that many policies lack the flexibility to adapt to changing market conditions. Not all policies for example allow existing homeowners or developers to rent out inclusionary ownership units, even under defined circumstances or for specified time periods. Strengthening policies to be more dynamic in the face of unexpected price dips (or spikes) is a key area where policies can improve in the coming years.

Sound stewardship practices can also help to minimize problems associated with changes in market conditions or buyer circumstances. Some affordable homeownership programs have an entity charged with staying in touch with buyers of affordable homes to answer their questions, help them access

assistance in the event that problems arise, and monitor long-term affordability provisions.<sup>65</sup> There is some evidence that this type of stewardship may help anticipate and address problems before they lead to a crisis. For example, a survey of community land trusts – a form of affordable homeownership that places a particular emphasis on ongoing stewardship – found that the severe delinquency and foreclosure rates of their homebuyers were far below market levels despite the fact that the homebuyers had low incomes.<sup>66</sup> While some inclusionary programs offer strong stewardship of inclusionary units, others do not, and are thus less able to provide the type of ongoing support some low-income homeowners may need to weather a crisis.

Montgomery County Department of Housing and Community Affairs

**A mix of moderately priced and market-rate condominiums in Montgomery County (MD).**



# New Opportunities

The story of inclusionary housing in America today is not solely one about new challenges. There have been multiple interesting new developments in inclusionary housing over the past five-to-six years that may lead to stronger policies.

## 1. Some Jurisdictions Actually Strengthened or Expanded Their Policies During The Market Downturn

These cities and counties are part of a nationwide trend toward instituting new or expanded policies in areas experiencing significant upzoning and/or major new transit investments:

- In 2006, Washington State legalized mandatory inclusionary housing in situations where a change in zoning or other requirements increases the development capacity of an area. Where an area is upzoned, a city can require developers to include affordable units – even if developers don't take full advantage of the larger building envelope/greater development potential.<sup>67</sup> Thus far, the municipalities of Kirkland, Redmond, and Sammamish have established new mandatory policies tied to upzoned areas.<sup>68</sup>
- In 2008, San Francisco increased its affordability requirements for newly upzoned industrial areas beyond the typical requirements of its inclusionary policy (from 15 percent to 18-22 percent).<sup>69</sup>
- In 2010, Fairfax County (VA) adopted the Tysons Comprehensive Plan, which requires developers to include 20 percent workforce and lower-income housing in exchange for lucrative redevelopment options at sites near the county's new Metro transit stations. Elsewhere in the county, the affordability requirement is 6.25-12.5 percent. Given the strong expected demand for housing near the planned stations, and sharply higher allowable density, private developers have shown a high level of interest in building, notwithstanding the affordability restrictions:
  - ▶ The area has seen rezoning applications for 40 of the 47 million square feet of existing uses in the area.

- ▶ 18,000 new dwelling units have been proposed.
- ▶ 2,390 total units have been approved since June 2010.
- ▶ One project is already under construction. It will provide 400 units (80 of them workforce units).<sup>70</sup>
- New York City's "designated areas" voluntary inclusionary policy, though passed before the downturn, provides further evidence of this trend. Created in 2005, the city's policy offers density bonuses of up to 33 percent in newly redeveloping areas in exchange for 20 percent affordability. Since that time, it has created and preserved approximately 1,800 below-market-rate units.<sup>71</sup> A large share of these homes was produced during the national economic downturn. One example is Williamsburg Community Apartments, which opened in May of 2011. It is home to 347 inclusionary rental apartments that are part of a larger condominium development located along the Brooklyn waterfront.<sup>72</sup>

These new policy additions reflect a growing willingness nationwide to ask for greater affordability where major zoning changes or transit investments have created significant new value for developers.<sup>73</sup> This may create an opening for jurisdictions seeking ways to ask for affordability from rental developments by way of incentives rather than mandates, to avoid legal complications. Similarly, they may point a way forward for jurisdictions seeking to establish workable new policies in places concerned about negative economic consequences.

Exchanging affordability for expanded development potential becomes more challenging, however, in places that have already adopted form-based codes, which lock in the maximum building envelope, or in places that have recently loosened restrictions on "by-right" densities and now lack extra zoning privileges to offer. Denver, for example, recently adopted a form-based code that increased by-right densities, but did not ask for greater affordability in return. It now finds itself in a weaker position to ask developers to include affordable rental units within new development, or to produce more affordable units on site.<sup>74</sup>

These new policy additions reflect a growing willingness nationwide to ask for greater affordability where major zoning changes or transit investments have created significant new value for developers.

## 2. HUD Has Brought Renewed Attention to Fair Housing Concerns

Over the past four years, HUD has asked jurisdictions to pay renewed attention to their legal obligation to affirmatively further fair housing. This heightened scrutiny comes on the heels of HUD's settlement with New York's Westchester County, in which the county was required to:

- Draft an analysis of impediments and action plan to address racial segregation.
- Spend \$51.6 million to build 750 units of affordable housing in the 32 jurisdictions with the lowest percentages of minority residents.
- Take legal action against local communities within its boundaries that refuse to eliminate exclusionary zoning.<sup>75</sup>

HUD reportedly plans to come out with a new rule on affirmatively furthering fair housing in 2013. The rule will provide important opportunities for advancing affordable housing and mobility goals, but could be contentious. There is a need to educate stakeholders about the new rule and

the opportunities and challenges it presents and to create a space for dialogue about potential concerns so they can be constructively addressed.

## 3. The Challenges in California Have Spurred New Creativity

Many jurisdictions are experimenting with new ways to tap market capital to create inclusive communities without requiring affordable rental developments per se. As we have seen, some jurisdictions have restructured inclusionary policies as a fee, with developers given the opportunity to waive out of the fee by voluntarily constructing affordable rentals. Other local governments are looking more closely at how they can leverage community-wide rezonings to promote affordability, particularly where these zoning changes create significant new value for developers and/or landowners.

In light of the growing need for creativity in jurisdictions across the U.S., along with new support from HUD for fair housing, this may be a particularly strategic time to consider new inclusionary housing tools and approaches.

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## Interviewees

This paper benefited significantly from interviews with local housing staff, researchers, and other experts in the field. Their ideas and insights greatly informed my research. I wish to thank:

**Michelle Allen**  
City of Boulder (CO)

**Emily Alvarado**  
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**Loryn Clark**  
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**Kristen Clements**  
City of San Jose (CA)

**Melissa Dailey**  
City of Santa Fe (NM)

**Chandra Egan**  
City of San Francisco (CA)

**Conrad Egan**  
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**Kathy Fedler**  
City of Longmont (CO)

**Catherine Firpo**  
City of Emeryville (CA)

**Adam Gordon**  
Fair Share Housing Center

**Sasha Hauswald**  
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**Rick Jacobus**  
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**Sarah Karlinsky**  
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**Matt Ladd**  
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**Michael Lane**  
Non-Profit Housing Association of Northern California

**Janet Lewis**  
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**Mary Beth Lonergan**  
Clarke Caton Hintz

**Alan Mallach**  
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**Melinda Pollack**  
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**Art Rodgers**  
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**Jaimie Ross**  
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**Howard Slatkin**  
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**Evelyn Stivers**  
Non-Profit Housing Association of Northern California

**Arthur Sullivan**  
A Regional Coalition for Housing (ARCH)

**Brad Weinig**  
Enterprise Community Partners

**Mike Westlake**  
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# Endnotes

1. Schwartz et al. (2012).
2. See for example: NPH (2007). The Non-Profit Housing Association of Northern California found that 63 new inclusionary housing policies were added in California between 2003 and 2007 – a 59 percent increase.
3. The precise number of inclusionary housing policies nationwide is elusive, given varying definitions and the inclusion of voluntary policies in some surveys. Brunick and Maier (2010) cite the research of David Rusk in estimating that there are roughly 400 mandatory policies nationwide. Calavita and Mallach (2010) estimate a total of 500 policies, including voluntary policies.
4. This list, assembled from various sources, includes: California, Colorado, New Mexico, Wyoming, Illinois, Florida, North Carolina, Virginia, Maryland, Massachusetts, Connecticut, New Jersey, Vermont, Washington (state), Hawaii, New York, Delaware, and Washington, DC. Sources include: Burchell et al. (2000); BPI (2003); Matthews (2006); Hollister et al. (2007); Brunick and Maier (2010); Calavita and Mallach (2010); and interviews by the author.
5. Over the past few years, the supply of rental properties has failed to keep pace with demand in many parts of the country as recently foreclosed homeowners, would-be homeowners, and a growing number of households in their 20s and 30s chose renting over buying, causing rents to escalate to some of their highest levels. Meanwhile, unemployment and underemployment persisted, causing incomes to fail to keep up with rising rents, leading to growing affordability problems in the rental market. See Williams (2012.)
6. Frey (2012).
7. EPA (2012). Between 2005 and 2009, infill development actually accounted for a majority of all new residential construction in multiple metropolitan areas, including the San Francisco Bay Area, San Jose-Sunnyvale, New York-New Jersey, and Los Angeles-Long Beach.
8. See pages 16 and 17 for a list of interviewees and references.
9. NAHB Land Development Services (2011); Interview with Michelle Allen, housing planner, city of Boulder (3/30/12).
10. The median home price in these communities for the three year period of 2009 to 2011 ranged from a low of \$150,700 (in St. Cloud) to a high of \$258,900 (in Bozeman). By contrast, the median home prices for the entire states of California, New Jersey, and Massachusetts (where most policies are located) averaged \$370,400, \$337,800, and \$332,800 respectively. Source: U.S. Census (2012).
11. NAHB Land Development Services (2011).
12. Interview with Jaimie Ross, affordable housing director, Florida Housing Coalition (12/13/12). For example, Davie's policy was adopted in 2008, Bozeman's policy in 2007, Madison's in 2004, and Lafayette's also in 2004.
13. See Brunick and Maier (2010).
14. The reduction was also designed to encourage greater on-site production on the heels of the city's transition to a fee-based requirement. This transition was prompted by the Palmer court case, which limits the ability of California cities to apply inclusionary requirements to rental properties, as described in greater detail starting on page 6. Sources: correspondence with Sarah Karlinsky, deputy director, San Francisco Planning + Urban Research (11/16/12); correspondence with Sasha Hauswald, public policy manager, San Francisco Mayor's Office of Housing (11/20/12).
15. Interview with Melissa Dailey, housing special projects manager, city of Santa Fe (7/11/12).
16. Interview with Susan Riggs Tinsky, executive director, San Diego Housing Federation (2/5/13).
17. Montgomery County Department of Housing and Community Affairs (2012).
18. Interview with Jaimie Ross, affordable housing director, Florida Housing Coalition (12/13/12).
19. Interview with Tammy Mayer, director of community engagement, Citizens Planning and Housing Association, (5/11/12).
20. Calavita (2004); NPH and CCRH (2003).
21. *Sacramento Housing Alliance v. City of Folsom* (Superior Court of California, June 15, 2012).
22. See, for example, Calavita (2004).
23. Calavita, Grimes, and Mallach (1997) described these mechanisms as "virtually obligatory" (p.126). But some municipalities are reported now to be favoring plans that achieve their fair share obligations through 100-percent affordable developments, rather than inclusionary housing, so as to achieve affordability with minimal new growth. Interview with Mary Beth Lonergan, senior associate, Clarke Caton Hintz (6/4/12). See also: Calavita and Mallach (2010).
24. See also: Calavita and Mallach (2010) and Brunick (2007).
25. There may be other forces at work in New Jersey as well. Historically, inclusionary housing has enjoyed support from developers because these policies have been the primary means for accessing higher densities in suburban jurisdictions, because inclusionary requirements are typically coupled with higher densities. This is unlike California, where state density bonus law already enables developers to increase the intensity of housing developments by 5-35 percent over base requirements, and to access other zoning modifications, depending on how many affordable units are included in their market-rate developments.
26. CHAPA (2011); interview with Sean Caron, policy director, CHAPA (3/30/12).
27. See Calavita, Grimes, and Mallach (1997); and Massachusetts DHCD (2012).
28. Interview with Rick Jacobus, director, Cornerstone Partnership at NCB Capital Impact (5/21/12).
29. This includes 728 units in Montgomery County (MD), at least 159 in Fairfax County (VA), and at least 347 in New York City, based on interviews with staff in each jurisdiction.
30. *Palmer/Sixth Street Properties, L.P. vs. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009). See also: Shigley (2009).
31. Brunick and Maier (2010).
32. Interview with Catherine Firpo, housing coordinator, city of Emeryville (11/28/12).
33. Interview with Michael Lane, policy director, NPH (11/29/12).
34. Goldfarb & Lipman L.L.P. (June 2012).
35. Interview with Michael Lane, policy director, NPH (11/29/12).
36. Goldfarb & Lipman L.L.P. (January 2012).



As the research affiliate of the National Housing Conference (NHC), the Center for Housing Policy specializes in developing solutions through research. In partnership with NHC and its members, the Center works to broaden understanding of the nation's housing challenges and to examine the impact of policies and programs developed to address these needs. Combining research and practical, real-world expertise, the Center helps to develop effective policy solutions at the national, state, and local levels that increase the availability of affordable homes.

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37. Analysis by the Center for Housing Policy, 2012.

38. Many small and mid-sized jurisdictions don't have housing divisions. Often redevelopment dollars were used to support staff members who were splitting their time between administering redevelopment area affordable housing programs and administering the jurisdiction's inclusionary housing policy.

39. Interview with Michael Lane, policy director, NPH (12/12/12).

40. Rick Jacobus (2007); interview with Rick Jacobus, director, Cornerstone Partnership at NCB Capital Impact (5/21/12).

41. Interview with Michael Lane, policy director, NPH (12/12/12).

42. California Affordable Housing Law Project of the Public Interest Law Project (2010).

43. Correspondence with Mike Rawson, director, the Public Interest Law Project/California Affordable Housing Law Project (11/14/12).

44. EPA OSC (2012). See also: Frey (2012); McIlwain (2010); Kannan (2010).

45. Here I am referring to costs for developers, rather than municipalities or regions as a whole. If we were to factor in the complete costs of infrastructure and externalities such as pollution in comparing infill versus other settings, this cost equation would be different.

46. Litman (2012).

47. Strategic Economics and Hixson & Associates (2008).

48. Trombka et al. (2004). This is not to suggest that there are no cost saving opportunities in infill settings. Walkable, transit-rich communities make it possible to serve residents with fewer parking spaces, for example. And many policies allow inclusionary units to use more modest finishes and appliances. But the placement of inclusionary units in the same building as market-rate units makes it more difficult to save costs through other important means, such as reducing the size of inclusionary units, using different materials for the building's exterior, or limiting common-area amenities.

49. Trombka et al. (2004).

50. Interview with Howard Slatkin, director of sustainability, NYC Department of City Planning (5/14/12).

51. HousingPolicy.org Forum (2008-2011).

52. NPH (2007).

53. NPH (2007).

54. NLIHC (2012).

55. This has been successful in Montgomery County (MD) and Fairfax County (VA).

56. Interview with Susan Riggs Tinsky, executive director, San Diego Housing Federation (5/17/12).

57. NPH and CCRH (2003). Massachusetts Association of CDCs (2006). Interview with Melinda Pollack, vice president, solutions, Enterprise Community Partners (4/13/12). Interview with Susan Riggs Tinsky, executive director, San Diego Housing Federation (5/17/12).

58. Calavita and Mallach (2010). This has prompted New Jersey to recently pass a "Use it or Lose it" law, which requires municipalities to either spend locally collected funds within four years or forfeit them to a state affordable housing fund. It is not yet clear, however, whether this will ensure that all collected funds are invested in affordable housing, particularly in areas of growing opportunity.

59. Calavita and Mallach (2010).

60. Interview with Rick Jacobus, director, Cornerstone Partnership at NCB Capital Impact (5/21/12).

61. See for example Denver, Davidson (NC), San Francisco, and Montgomery County (MD).

62. One jurisdiction reports that inclusionary prices need to be as much as 30 percent lower than market prices before buyers become motivated to purchase inclusionary units. See Center for Housing Policy and the Lincoln Institute of Land Policy (2009).

63. Interview with Art Rodgers, senior housing planner, Washington, DC (4/4/12).

64. Interview with Lisa Schwartz, senior planning specialist, Montgomery County (MD) (5/1/12).

65. Jacobus (November 2007).

66. Thaden (2011).

67. The Housing Partnership (2007).

68. Interview with Arthur Sullivan, program manager, A Regional Coalition for Housing (5/21/12).

69. Interview with Chandra Egan, senior community development specialist II, city of San Francisco (4/13/12).

70. Fairfax County Office of Community Revitalization and Reinvestment (October 2011).

71. New York City Department of City Planning (February 17, 2009).

72. HUD (July 2011).

73. Calavita and Mallach (2009).

74. Interview with Melinda Pollack, vice president-solutions, Enterprise Community Partners (4/13/12).

75. Hannah-Jones (November 2, 2012).

**ATTACHMENT 2**  
**City Inclusionary Zoning Ordinance**



*California*  
LEGISLATIVE INFORMATION

**AB-1229 Land use: zoning regulations. (2013-2014)**

CALIFORNIA LEGISLATURE— 2013–2014 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1229**

**Introduced by Assembly Member Atkins  
(Principal Coauthor(s): Assembly Member Mullin)  
(Principal Coauthor(s): Senator Leno)**

**February 22, 2013**

**An act to amend Section 65850 of the Government Code, relating to land use.**

**LEGISLATIVE COUNSEL'S DIGEST**

AB 1229, as introduced, Atkins. Land use: zoning regulations.

The Planning and Zoning Law authorizes the legislative body of any city or county to adopt ordinances regulating zoning within its jurisdiction, as specified.

This bill would additionally authorize the legislative body of any city or county to adopt ordinances to establish, as a condition of development, inclusionary housing requirements, as specified, and would declare the intent of the Legislature in adding this provision. The bill would also make a technical, nonsubstantive change.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 65850 of the Government Code is amended to read:

**65850.** The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

- (a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.
- (b) Regulate signs and billboards.
- (c) Regulate all of the following:
  - (1) The location, height, bulk, number of stories, and size of buildings and structures.
  - (2) The size and use of lots, yards, courts, and other open spaces.

- (3) The percentage of a lot which may be occupied by a building or structure.
- (4) The intensity of land use.
- (d) Establish requirements for ~~offstreet~~ *off-street* parking and loading.
- (e) Establish and maintain building setback lines.
- (f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.
- (g) *Establish, as a condition of development, inclusionary housing requirements, which may require the provision of residential units affordable to, and occupied by, owners or tenants whose household incomes do not exceed the limits for lower income, very low income, or extremely low income households specified in Sections 50079.5, 50105, and 50106 of the Health and Safety Code.*

**SEC. 2.** The Legislature finds and declares all of the following:

- (a) Inclusionary housing ordinances have provided quality affordable housing to over 80,000 Californians, including the production of an estimated 30,000 units of affordable housing in the last decade alone.
- (b) Since the 1970s, over 170 jurisdictions have enacted inclusionary housing ordinances to meet their affordable housing needs.
- (c) While many of these local programs have been in place for decades, the recent decision in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, has created uncertainty and confusion for local governments regarding the future viability of this important local land use tool.
- (d) It is the intent of the Legislature to reaffirm the authority of local jurisdictions to enact and enforce these ordinances.
- (e) The Legislature declares its intent in adding subdivision (g) to Section 65850 of the Government Code, pursuant to Section 1 of this act, to supersede any holding or dicta in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, to the extent that the opinion in that case conflicts with that subdivision. This act shall not otherwise be construed to enlarge or diminish the authority of a jurisdiction beyond those powers that existed as of July 21, 2009.